(14)

No. 03-710
Title: Gerald Devenpeck, et al., Petitioners
v.
Jerome Anthony Alford
Docketed: November 14, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-35141)
Decision Date: June 23, 2003
Rehearing Denied: August 8, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 6 2003	Petition for a writ of certiorari filed. (Response due December 15, 2003)
Dec 30 2003	DISTRIBUTED for Conference of January 16, 2004.
Jan 8 2004	Response Requested . (Due February 9, 2004)
Feb 6 2004	Brief amicus curiae of State of California ex rel Bill Lockyer, Attorney General filed.
Feb 10 2004	Order extending time to file response to petition to and including March 10, 2004.
Mar 10 2004	Brief of respondent Jerome Anthony Alford in opposition filed.
Mar 19 2004	Reply of petitioners Gerald Devenpeck, et al. filed.
Mar 24 2004	DISTRIBUTED for Conference of April 16, 2004.
Apr 19 2004	Petition GRANTED.
May 12 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including June 17, 2004.
Jun 16 2004	Brief of petitioners Gerald Devenpeck, et al. filed.
Jun 17 2004	Brief amicus curiae of Center for the Community Interest filed.
Jun 17 2004	Joint appendix filed.
Jun 17 2004	Brief amicus curiae of United States filed.
Jun 17 2004	Brief amici curiae of National League of Cities, et al. filed.
Jun 17 2004	Brief amici curiae of State of California, et al filed.
Jul 16 2004	Extension of time within which to file respondent's brief on the merits to and including August 23, 2004.
Aug 19 2004	CIRCULATED.
Aug 23 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 23 2004	Further extension of time within which to file respondent's brief on the merits to and including August 27, 2004.
Aug 25 2004	Brief of respondent Jerome Anthony Alford filed. (Distributed)
Sep 1 2004	SET FOR ARGUMENT Monday, November 8, 2004.
Sep 3 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 23 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Sep 24 2004	Record receved from U.S.D.C. Western Dist. of Washington. (1 box)
Sep 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Sep 29 2004	Reply of petitioners Gerald Devenpeck, et al. filed. (Distributed)
Oct 19 2004	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 1 2004	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 8 2004	Argued. For petitioners: Maureen A. Hart, Senior Assistant Attorney General, Olympia, Wash., and for the United States, as amicus curiae, James B. Comey, Deputy Attorney General, Office of Deputy Attorney General, Washington, D.C. For respondent: R. Stuart Phillips, Poulsbo, Wash.

Supreme Court, U.S.
FILED
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NO. 03-710 NOV 6 2003

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fourth Amendment's objective reasonableness test, an arrest is deemed "reasonable" if there is probable cause to believe that a violation of law has occurred. Two judicial circuits find an arrest reasonable if, based on an objective assessment by a reasonable officer, there is probable cause to arrest for any offense. On the other hand, at least five judicial circuits find an arrest to be reasonable only if there is probable cause to arrest for crimes "closely related" to the crime or crimes articulated by the arresting officer. This case presents the following questions:

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For the purpose of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the "closely related offense doctrine", the Ninth Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

PARTIES

The parties to the proceeding below were:

Petitioners: Gerald Devenpeck, a Washington State Patrol Officer, Joi Haner, a Washington State Patrol Officer, and their marital communities. Petitioners were aligned as defendants/appellees below.

Respondent: Jerome Anthony Alford. Respondent was aligned as plaintiff/appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Gerald Devenpeck and Joi Haner, officers of the Washington State Patrol, and their marital communities, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 333 F.3d 972. App. 1a-22a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. App. 23a. The order of the United States District Court for the Western District of Washington granting in part and denying in part Defendants' Motion For Summary Judgment is also unpublished. App. 28a-41a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 23, 2003. App. 1a-22a. On August 8, 2003, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Other relevant statutes are set out in the Appendix. These include the Privacy Act, prohibition against recording a private conversation, Wash. Rev. Code 9.73.030 (App. 66a-68a); the prohibition against impersonating a law enforcement officer, Wash. Rev. Code 9A.60.040(3) (App. 68a-69a); and, the prohibition against obstructing a law enforcement officer, Wash. Rev. Code 9A.76.020 (App. 69a).

STATEMENT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The arrest of an individual constitutes a "seizure" of "persons". Consequently, an arrest is subject to the constitutional requirement that it not be "unreasonable". Generally, an arrest is reasonable if, based on an objective assessment of the fact and circumstances, a reasonable officer would conclude there is probable cause to believe that a violation of law has occurred.

This case concerns the scope of violations to which a court may look in assessing the existence of probable cause to arrest. A number of states, including Washington, and a number of judicial circuits allow courts to find probable cause for any violation objectively observable to a reasonable officer. Other states and judicial circuits, including the Ninth Circuit, in the present case, allow courts to find probable cause only for violations that are "closely related to and arising out of the same conduct" as the crime or crimes that the arresting

officer may have articulated at the time of the arrest. The question is whether the Fourth Amendment precludes a court from considering the existence of probable cause to arrest for violations that are not related to and do not arise out of the same conduct as that articulated by the officer at the time of the arrest.

1. Incident Giving Rise to Section 1983 Action

Respondent Jerome Alford brought Fourth Amendment based § 1983 claims and state law false arrest claims against two Washington State Troopers. The underlying facts involving Mr. Alford's arrest and those facts critical to the analysis here are largely undisputed. And as Judge Gould noted in his dissent to the opinion at issue here:

> "The officers whom the majority would tag with liability, despite an exculpatory jury verdict in the officers' favor, here stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least." App. 17a.

While on duty, Washington State Patrol Trooper Joi Haner observed Mr. Alford's vehicle stopped behind a disabled vehicle on the highway. As he was pulling in behind the stopped vehicles, Trooper Haner observed Alford quickly returning to his car. Alford told Haner that he had given the people in the car a flashlight to help them fix their flat tire. Alford then proceeded to his own car and drove off. Haner checked with the occupants of the stranded vehicle and learned that they believed

Alford was a police officer because his car had wig-wag headlights (headlights that flash on/off in an alternating manner).

Concerned that Alford was pretending to be a police officer, Trooper Haner proceeded after Alford and pulled him over. Upon stopping Alford, Haner observed that Alford had a police-band radio broadcasting Kitsap County Sheriff's Office communications (the same frequency Haner was using), had a microphone attached to the radio, a portable police scanner, and handcuffs. Haner also observed that Alford's license plate was nearly unreadable due to a colored license plate cover.

When asked by Haner to operate the wig-wag headlights, Alford claimed to be unable to get them to operate. Later, officers located a button on the instrument panel that easily activated the wig-wag lights. When Haner's supervisor, Sgt. Devenpeck arrived, he noticed a tape recorder on the passenger seat of Alford's car and determined that Alford had tape recorded conversations with the officers. Alford was then informed that he was under arrest for violation of Washington's Privacy Act (Wash. Rev. Code 9.73.030(1)(b)), which provides that, "[I]t shall be unlawful for any individual . . . to intercept or record any . . . private conversation, by any device electronic or otherwise . . . without first obtaining the consent of all persons engaged in the conversation." App. 66a-67a.

While Haner was transporting Alford to the jail, Sgt. Devenpeck was able to reach Deputy Prosecuting Attorney Mark Lindquist. Lindquist discussed with Devenpeck that there was probable

cause to arrest for obstructing an officer, impersonating an officer, as well as for a violation of the state Privacy Act.

The Privacy Act charge was the only charge ultimately filed against Alford. The charge was later dismissed based on an intermediate state appellate court decision that conversations between law enforcement officers and motorists on public highways are not "private" conversations for purposes of the Privacy Act. App. 9a-10a.

2. Procedural History

Respondent brought federal civil rights and state false arrest claims against the two Troopers and the Washington State Patrol in the United States District Court for the Western District of Washington at Tacoma. Petitioners moved for summary judgment arguing that the officers had probable cause to arrest Alford for the Privacy Act violation and that the officers were entitled to qualified immunity as a matter of law in any event.

The Federal district court determined that the Privacy Act did not apply based upon *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992), (recording an arrest made by public officers performing functions on a public thoroughfare near passersby did not violate the Act because the conversation was not private). Although the court concluded that the law was clearly established it found that issues of fact remained as to whether the officers acted reasonably. Nevertheless, the district court denied Petitioners' motion for summary judgment and allowed the case to go to a jury for a

determination of reasonableness for qualified immunity purposes. App. 28a-41a.

After four days of trial, a jury of six reached a verdict in favor of the Petitioners. The issue presented to the jury by way of the jury instructions was whether the Washington State Patrol and two of its Troopers had probable cause and/or acted reasonably in arresting the Respondent. App. 61a-64a. Alford objected to none of the jury instructions. Petitioners objected only to those instructions that found the law was clearly established. App. 47a-58a. Based on the facts and the instructions, the jury found in favor of Petitioners and against Respondent. App. 27a.

Respondent appealed the verdict to the Ninth Circuit Court of Appeals. A little more than two weeks prior to oral argument in this matter, the panel served upon the parties an order directing the parties to be prepared to discuss footnote 6, on page 1428, to *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho*, 515 U.S. 1144 (1995). App. 24a. In footnote 6 the court concluded that there was probable cause to arrest for an offense that was not charged because it was closely related to the offense that was charged. In dicta the court suggested that if the offenses were not closely related there would not be probable cause.

Approximately one month prior to the panel reaching its decision in *Alford*, a different three judge panel of the Ninth Circuit rendered its opinion in *Bingham v. City of Manhattan Beach*, 329 F.3d 723 (9th Cir. 2003) (*Bingham* I). In *Bingham* I the plaintiff was arrested for driving with an expired

license. But there was no probable cause for this arrest because it only applied if the driver was under the age of sixteen. Nevertheless, the panel concluded there was probable cause to arrest to verify an outstanding arrest warrant, which may have applied to the plaintiff—a basis completely unrelated to driving with an expired license. Petitioners believed this case was directly on point for the legal principles addressed therein and therefore cited *Bingham* I to the panel still considering *Alford*. App. 59a.

In reaching its decision, two members (Judges Browning and B. Fletcher) of a three judge panel ruled in favor of Respondent. The majority ruled that it was an abuse of discretion for the district court to deny respondent's motion for a new trial because there was no evidence to support the jury's verdict. The majority reasoned that there was no probable cause because "[t]ape recording officers conducting a traffic stop is not a crime in Washington." App. 9a. Petitioners argued that, "they had probable cause to arrest Alford for offenses other than tape recording, and therefore, Alford's rights were not violated". App. 10a. The majority rejected this argument based on the "closely related offense doctrine". According to the majority, "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." App. 3a-4a. According to the majority "any impersonation charge would be based on Alford's use of wig-wag headlights [and an] obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights". App. 10a-11a. The majority concluded that these "offenses are not

closely related to the crime for which [petitioners] arrested [Alford] . . . tape recording a traffic stop". App. 11a. The majority also ruled that Petitioners were not entitled to qualified immunity. Even though a jury ruled in favor of Petitioners, the majority concluded that Petitioners did not make a reasonable mistake in arresting Alford for violating the Washington Privacy Act. App. 1a-22a.

Judge Gould filed a dissent largely focusing on the ample evidence that would support a finding that the officers acted reasonably and were entitled to qualified immunity. "The jury had plenty of evidence to conclude that the officers acted reasonably, as defined by the jury instructions to which Alford did not object." App. 22a.

Petitioners filed a petition for rehearing en banc inasmuch as there was substantial evidence to support a jury finding of reasonableness and because the Ninth Circuit's application of the "closely related offense doctrine" was in direct conflict with the Ninth Circuit's decision in *Bingham* I rendered just one month prior to the opinion in this case.

The Ninth Circuit denied Petitioners' petition for rehearing en banc on August 8, 2003. App. 23a. However, shortly thereafter, the panel in *Bingham I*, issued a corrected opinion that purportedly reconciled its holding there with the holding in *Alford*. *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003) (*Bingham* II).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three important reasons. First, there is significant conflict among the circuits as to whether probable cause may be found only in "closely related" offenses–arising out of the same conduct. Second, the "closely related offense" doctrine is inconsistent with the decisions of this Court. Third, the majority's opinion in *Alford* and the "closely related offense" doctrine it propounds will frustrate the administration of justice by encouraging law enforcement officers to "stack charges" in order to assure the existence of probable cause and to avoid potential liability.

1. There Is A Significant Conflict Among The Circuits Regarding The Applicability Of The "Closely Related Offense" Doctrine

There is a continuing conflict between the various federal circuit courts of appeals on the issue of which crimes will support the existence of probable cause to arrest—only crimes "closely related" to the crime announced by the officer at the time of the arrest or any crime supported by the facts and circumstances then known to the officer at the time of the arrest.

The Eleventh and D.C. Circuit Courts of Appeal have found that, since they do not determine probable cause from a subjective standpoint, probable cause for "any crime" is sufficient. *Lee v. Ferarro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (neither subjective reliance on offense for which no probable cause exists nor verbal announcement of the wrong offense vitiates the arrest); *United States*

v. Bookhardt, 277 F.3d 558 (D.C. Cir. 2002) (in a suppression case, the defendant was arrested for an expired license but the officer used facts showing probable cause to arrest for reckless driving to justify the arrest).

Bookhardt involved facts very similar to the present case. There the arresting officers mistakenly believed that driving with an expired license was a crime. Because, however, the license had only been expired for less than ninety days, the offense was an infraction, not a crime. Finding that probable cause existed for other offenses, however, the Court recognized:

> "Other circuits have similarly concluded that, even if probable cause does not support arrest for the offense charged by the arresting officer, an arrest (and search incident thereto) is nonetheless valid if the same officer had probable cause to arrest the defendant for another offense. This result is consistent with the Supreme Court's holding in *Whren v. United States*, that the existence of probable cause must be determined objectively from the facts and circumstances known to the officer at the time of arrest without regard to the 'actual motivations' or '[s]ubjective intentions' of the officers involved. 517 U.S. 806, 813 (1996)." *Bookhardt*, 279 F.3d at 565 (footnote omitted).

On the other hand, the Fifth, Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeal have adopted the principle that the announced crime need not be the only basis on which the arrest is

justified. These courts hold, however, that the crime used to justify the arrest must be "closely related" to the crime identified at the time of the arrest.[1] *Vance v. Nunnery*, 137 F.3d 270, 273-77 (5th Cir. 1998) (applying "closely related offense" doctrine to defeat defense of qualified immunity); *Avery v. King*, 110 F.3d 12 (6th Cir. 1997) (even where there is no probable cause to arrest the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense which may entitle the arresting officer to qualified immunity); *Biddle v. Martin*, 992 F.2d 673 (7th Cir. 1993) (in § 1983 actions for false arrest, probable cause need not have existed for the charge for which the plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge); *United States v. Rambo*, 789 F.2d 1289 (8th Cir. 1986) (it is immaterial that at the time of the entry and arrest the officers did not have in mind the specific charge upon which the arrest can be justified: the offenses need only be closely related, and probable cause to arrest the defendant on the appropriate charge must have been present at the time); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993) (upholding arrest because although the police lacked probable cause to arrest the defendant for violation of the

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[1] In the First Circuit the court has applied the closely related doctrine in some cases and ignored it in others. *Cf., United States v. Lee*, 317 F.3d 26, 33 n.2 (1st Cir. 2003), *cert. denied sub nom. Ngai Man Lee v. United States*, 123 S. Ct. 2112 (2003) (arrest upheld for receiving stolen goods based on probable cause on credit card fraud charge); *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (applying "closely related offense doctrine" to avoid extrapolation of offenses in an effort to justify a sham arrest).

concealed weapon statute that was the actual reason for the arrest, they had probable cause to arrest him for violating a separate ordinance requiring that a gun be carried in a locked container).[2]

2. The "Closely Related Offense Doctrine" Is Itself Inconsistent With The "Objective Reasonableness Test" And The Decisions Of This Court

In analyzing Fourth Amendment claims of unlawful search and seizure, this Court has applied an "objective reasonableness" test. Under that test the focus is on the objective facts and circumstances known to the officer at the time of arrest. *Beck v. Ohio,* 379 U.S. 89 (1964). *See Illinois v. Gates,* 462 U.S. 213 (1983) (applying a totality of circumstances analysis to probable cause determinations). *Accord Alabama v. White,* 496 U.S. 325, 328-29 (1990). The law enforcement officer's subjective beliefs or motive for making an arrest plays no role in the Fourth Amendment analysis. *Arkansas v. Sullivan,* 532 U.S. 769 (2001); *Whren v. United States,* 517 U.S. 806 (1996). *See also United States v. Robinson,* 414 U.S. 218 (1973).

In *Scott v. United States,* 436 U.S. 128 (1978), the Court rejected the contention that wiretap evidence should be excluded based on the subjective

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[2] *See Driebel v. City of Milwaukee,* 298 F.3d 622, 644 (7th Cir. 2002); *United States v. Martinez,* 465 F.2d 79, 81 (2d Cir. 1972) (*per curiam*). For a compilation of cases, both state and federal, demonstrating the lack of uniform application of the closely related offense doctrine, see 1 Wayne R. La Fave, Criminal Practice Series, *Search and Seizure, Criminal Procedure* § 1.4 n.28 (3d ed. 1996 & Supp. 2004).

intent of the officer. The Court held that, "[t]he fact that the officer did not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action, does not invalidate the action taken as long as the circumstances viewed objectively, justify that action." *Scott,* 436 U.S. at 138.[3]

The "closely related offense doctrine" and the Ninth Circuit's application of it in this case, is not an objective analysis of the facts known to the officer. The "closely related offense doctrine" instead keys on the subjective belief of the officer as to which crimes probable cause exists, and/or those crimes that the officer may choose to articulate at the time of arrest. Following the holdings in *Sullivan* and *Whren,* even if an arrest is a sham, no Fourth Amendment violation occurs if probable cause existed for a crime cited by the officer.

In contrast, under *Alford* and the other Circuits that apply the so called "closely related offense doctrine", even if an arrest is not a sham and the officer has knowledge of facts supporting probable cause, there is a violation of the Fourth Amendment if the crime for which probable cause exists does not arise from the same conduct as the crime identified by the officer at the time of arrest. The "closely related offense doctrine" forgives an

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[3] The leading commentator in the area of criminal procedure has advocated that the holding in *Scott* should be defined to make it clear that, "[i]n all circumstances Fourth Amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved'". 1 Wayne R. La Fave, Criminal Practice Series, *Search and Seizure* § 1.4(a) (3d ed. 1996).

officer's mistaken belief about the existence of probable cause only if probable cause exists for another crime related to and arising out of the same conduct as the crime identified at the time of arrest. But if the crimes for which probable cause exists involves different facts from the crime cited at the time of arrest, a court must ignore the existence of probable cause for those crimes, declare the arrest unlawful, and subject the officer to civil rights liability. [4]

In the present case, the law enforcement officers discussed with a deputy prosecutor the existence of probable cause to arrest, not only the Privacy Act Violation (tape recording), but also impersonating a law enforcement officer and obstructing a law enforcement officer. *Alford's* application of the "closely related offense doctrine", however, precludes consideration of the objective facts and circumstances which were clearly known to the officers at the time of arrest. The majority opinion in *Alford* refused to consider the existence of probable cause on the impersonation and obstruction

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[4] The dissenting opinion correctly notes that Alford's arrest was not a sham.

> "The officers did not arrest Alford on a rogue mission, nor motivated by malice nor on a whim; instead, they provided an example of how responsible and fair-minded officers should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him. Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop." App. 18a.

charges because they were unrelated to the tape recording which was the basis for the Privacy Act claim. Specifically the court held:

> "The conduct underlying the crimes suggested by the defendants is unrelated to Alford's tape recording. Any impersonation charge would be based on Alford's use of wig-wag headlights. An obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how to do so. These offenses are not closely related to the crime for which defendants arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the defendants did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, does not cure the lack of probable cause here. *Gasho,* 39 F.3d at 1428 n.6." App. 10a-11a. [5]

The focus of the "closely related offense doctrine" on the arresting officer's subjective belief as to the offense for which probable cause existed is irreconcilable with this Court's decision in *Florida*

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[5] As Judge Gould correctly noted in his dissenting opinion in *Alford*, since the District Court had permitted the case to go to the jury and the jury had found no liability on the Respondent's claims against Sergeant Devenpeck and Trooper Haner, the evidence was to be viewed in the light most favorable to the officers. App. 19a-20a.

v. Royer, 460 U.S. 491 (1983). In *Royer*, this Court held that if the objective probable cause test is met, it is not necessary to establish that the particular officer making the arrest or search subjectively believed that probable cause was present. This Court observed, "[t]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry* stop rationale would not foreclose the state from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Royer*, 460 U.S. at 507 (citing *Peters v. New York, decided with Sibron v. New York*, 392 U.S. 40, 66-67 (1968)).[6]

The "closely related offense doctrine" is irreconcilably in conflict with *Royer* and its progeny. The synthesis of these two concepts would yield a rule that if law enforcement agents do not think they have probable cause, but they actually do, an arrest is upheld; but if they actually believe they have probable cause, and in fact do, but it is for a different crime, the arrest is invalid.

Such a rule suffers from a lack of defining principle, especially on the facts in this case, where Alford's *Terry* stop was based on the crime of impersonating a law enforcement officer. Contrary to this Court's Fourth Amendment jurisprudence,

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[6] *United States v. Roy*, 869 F.2d 1427 (11th Cir. 1989); *United States v. Moses*, 796 F.2d 281 (9th Cir. 1986) (fact that officer did not believe probable cause to arrest existed before search did not preclude finding that law enforcement agents had probable cause and therefore search incident to arrest was proper).

objective facts are ignored and the lynchpin of the analysis is a mistaken, subjective belief that probable cause exists for an offense that is unrelated to the crimes for which probable cause actually does exist.

An officers' motives, subjective beliefs and/or decision to articulate only one of many possible crimes as the basis for an arrest, should not be a factor in determining the lawfulness of the arrest under the Fourth Amendment. *Arkansas v. Sullivan*, 532 U.S. 796 (2001); *Whren v. United States*, 517 U.S. 806 (1995). If probable cause actually and objectively exists, an officer's mistaken belief about its existence for the wrong offense is no more violative of the Fourth Amendment than a mistaken belief that it does not exist at all. *See Royer*, 460 U.S. at 507.

3. The Ninth Circuit's Application Of The "Closely Related Offense Doctrine" Is In Conflict With Decisions Of Washington State Courts

In determining the validity of an arrest, Washington State courts apply an objective test and, consistent with this Court's prior directives, they look to the facts and circumstances known to the officer. Just as an arrest not supported by probable cause will not be recognized as lawful based on the officer's subjective belief that an offense has been committed, an arrest that is supported by a probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists. *See Washington v. Vangen*, 72 Wash. 2d 548,

433 P.2d 691 (1967); *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash. 2d 1007 (1992); *City of Seattle v. Cadigan*, 55 Wash. App. 30, 776 P.2d 727, *review denied*, 113 Wash. 2d 1025 (1989); *Washington v. Stebbins*, 47 Wash. App. 482, 735 P.2d 1353, *review denied*, 108 Wash. 2d 1026 (1987).[7] *See also Washington v. Greene*, 75 Wash. 2d 519, 521, 451 P.2d 926, 928 (1969) ("property seized incident to a lawful arrest may be used in the prosecution of a suspected person for a crime other than the one for which he was arrested").

4. The Majority's Opinion In *Alford* And The "Closely Related Offense" Doctrine It Propounds Will Frustrate The Administration Of Justice By Encouraging Law Enforcement Officers To "Stack Charges" In Order To Assure The Existence Of Probable Cause And To Avoid Potential Liability

Although several circuits have adopted varying degrees of an unrelated offense rule, the underlying justification is to preclude an "ex post facto" sham justification for an arrest. Tracing the authority for Federal circuit court decisions which have adopted some form of an unrelated offense rule goes back to precedent which precedes and has been undermined by this Court's clear holdings in *Whren*, *Royer*, and *Sullivan* that an arresting officer's

[7] Although *Huff* was cited to the Ninth Circuit initially, the *Alford* decision did not acknowledge, either in its Fourth Amendment or qualified immunity analysis, that its application of the closely related offense doctrine was in conflict with the clearly established law of the State of Washington.

subjective motives or mistaken beliefs underlying an arrest are not part of the objective determination of probable cause. That determination is based on objective reasonableness taking into consideration the totality of facts and circumstances known by the officer at the time of arrest.

At trial in this case, when Sergeant Devenpeck was asked about other possible charges, he indicated that he had discussed obstructing a public servant with the deputy prosecutor, Mr. Lindquist, but said "the State Patrol doesn't stack charges, which they don't". App. 43a. As examples, Sergeant Devenpeck indicated:

> "If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that is why you stopped them and you see they are intoxicated, you don't normally write them a ticket for the stop sign violation[.]" App. 43a.

Typically, within the criminal justice system, the initial on-the-spot decision by a police officer of what charge to cite for an arrest is reviewed pre-filing by law enforcement supervisors or, as occurred in this case, by a deputy prosecutor. *See*, 1 Wayne R. La Fave, Criminal Practice Series, *Criminal Procedure, The Decision to Charge* § 1.3(8) step 6 (3d ed. 1996). Prosecutors often exercise their discretion to lower charges based on a determination that the penalty for the higher charge is too severe for the nature of the crime or additional process costs involved in the proceeding are not justified. *Id.*

One of the primary problems in applying a "closely related offense doctrine" is that it usurps the prosecutorial function by concentrating the probable cause analysis on the initial, often hurried, on-scene charging decision by law enforcement and not on the pre-, or even post-, filing review by a prosecuting attorney. Then, comporting with the balancing of interests recognized in *Gerstein v. Pugh*, 420 U.S. 103 (1975), an arrestee can be brought before a neutral and detached magistrate for an objective determination, based on the totality of facts and circumstances known to the arresting officers, whether probable cause exists.[8]

Enforcement of the "closely related offense doctrine", either through the suppression of evidence, or through § 1983 civil rights liability, would encourage, if not require, law enforcement officers to "stack" charges at the time of the initial arrest. Operationally, this might cause the unfortunate consequence of higher bail and longer pre-arraignment and pretrial detention of criminal suspects.[9]

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[8] The problem which occurred in this case was that the prosecuting attorney, Mr. Lindquist, with whom Sergeant Devenpeck spoke, was unaware of the decision in *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992), and therefore did not modify the charge to impersonating and/or obstructing a law enforcement officer, for which probable cause clearly existed.

[9] *See generally United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971). The court noted that validating an arrest based upon crimes which were not in some fashion related,

> "[w]ould force police officers to routinely charge every citizen taken into custody with every offense they thought they could be held for in order to increase the chances that at least one charge would survive the test of probable cause. Such a clogging of the criminal process already heavily encumbered, would be pointless."

Atkinson, 450 F.2d at 838.

5. The Ninth Circuit's Application Of The "Closely Related Offense Doctrine" Is In Conflict With Decisions Of This Court Applying An Objective Reasonableness Test On The Issue Of Qualified Immunity

As this court held in *Saucier v. Katz*, 533 U.S. 194, 202 (2001): "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." The Ninth Circuit has struggled in applying this standard. In *Hunter v. Bryant*, 502 U.S. 224 (1991), this Court reversed the Ninth Circuit's holding that qualified immunity is a question of fact for the jury. Currently pending on certiorari before this Court is another case involving the Ninth Circuit's application of qualified immunity. *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), *cert granted*, 123 S. Ct. 1354 (2003). In *Ramirez* the Ninth Circuit concluded that the law was clearly established in absence of either binding authority from this Court or the Court of Appeals. This is a similar case. Prior to the Ninth Circuit's announcement of the closely related offense/same conduct test here, the courts in Washington State clearly indicated that probable cause to arrest for

any offense was sufficient in this state. In *Huff*, the state court of appeals found:

> "[The officer's] subjective intent to arrest [the defendant] for obstructing a public servant is immaterial. Assuming without holding that he could not lawfully have arrested her on that basis, the arrest here was nevertheless valid because he had objectively sufficient probable cause to believe that she was in possession of a controlled substance." *Huff*, 826 P.2d at 702.

Thus, prior to the Ninth Circuit's opinion in *Alford*, the law was not clearly established that an officer could not use the existence of probable cause for any crime to justify his or her arrest of a suspect.

To be sure, the Ninth Circuit had previously held that when the law is not clearly established by binding federal precedent, the court would consider the State's cases to make such a determination in qualified immunity cases. *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1111-13 (9th Cir. 1988) ("Absent binding precedent, we look at 'all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established.'"). Somehow, the Ninth Circuit in *Alford* rejected this approach and did not even discuss the holding in *Huff* when it denied the officers qualified immunity and reversed the jury's verdict in favor of the police officers.

Even the Ninth Circuit's application of the "closely related offense doctrine" has been

inconsistent. In *Bingham* II, the Court did not apply the "closely related offense doctrine" despite the fact that the unrelated justification for the arrest, an outstanding 1977 warrant, was clearly unrelated to any events that occurred at the time of the arrest. *Bingham* II, 341 F.3d at 951.[10]

In *United States v. Patzer*, 284 F.3d 1043, 1045 n.4 (9th Cir. 2001), the Ninth Circuit cited *Bookhardt* for the proposition that "an arrest is . . . valid if the same officer had probable cause to arrest the defendant for another offense". Contrary to the assertion of the *Alford* majority, *Gasho*, 39 F.3d at 1428 n.6, was not controlling authority. App. 13a. *Gasho*'s discussion of the "closely related offense doctrine", in a footnote, was *dicta* because the offenses in that case were determined by the court to be related and therefore the issue was not before the court.

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[10] The dissent in *Bingham* II observed:

> "In *Alford* we held that even though more than one offense occurred during the same encounter with the police the offenses were in fact unrelated and, accordingly, probable cause for an arrest on one could not be used to justify the arrest on another. Perhaps the majority's new rule is that, while an officer may not rely on unrelated offenses that are close in time, they may rely on unrelated offenses that occur decades apart. I simply do not comprehend the logic of this argument. . . . The new rule the majority adopts – the distantly unrelated offense doctrine—appears to be that the less related the offenses, the more likely the alternate justification for the arrest to be upheld." *Bingham* II, 341 F.3d at 955 (Rhinehart, J., dissenting).

The court also summarily dismissed the defendants' citation to *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973), which applied the same Fourth Amendment interpretation as *Huff*. Referring to *Saunders*, the Ninth Circuit stated: "Whatever the rule may have been in that Circuit, this is not the test applied in the Ninth Circuit." App. 10a. This conflict in the Ninth Circuit and among the other federal courts of appeals surely does not make the law "clearly established" and makes it even less so after the decisions here in *Alford* and *Bingham* II. As already noted, there was a split in the Circuit Courts of Appeal and one of the leading commentators in the area of criminal procedure rejects any Fourth Amendment analysis which would focus on the intent or motivation of the officers involved. *See supra* note 3.

The Ninth Circuit erroneously concluded that its application of the "closely related offense doctrine" was consistent with the qualified immunity objective reasonableness test. The Court stated:

> "Even if we were not compelled by our precedent to consider only whether probable cause may have existed for closely related offenses based on the same conduct for which Alford was arrested, to hold otherwise would improperly turn the objective reasonableness inquiry into the officers' subjective motivations or beliefs at the time of arrest." App. 13a n.2.

A proper application of the objective reasonableness standard, however, does not require courts to ignore knowledge of facts and circumstances which were

within the possession of an arresting officer at the time of arrest.

Proper application of "closely related offense doctrine" in the context of a qualified immunity analysis does not require the court to view the evidence with judicial blinders precluding consideration of any objective facts supporting probable cause which does not arise from the same conduct as the crime cited by the arresting officer. In the case at bar, Sergeant Devenpeck and Trooper Haner were not only aware of the facts supporting an arrest for impersonating or obstructing a law enforcement officer, they did a *Terry* stop on Mr. Alford based upon reasonable suspicion that he was impersonating a law enforcement officer and spoke with the deputy prosecutor about probable cause for those offenses while they were transporting Mr. Alford to jail.

The Ninth Circuit also misapplied the qualified immunity analysis in reversing the jury's determination that the officers' mistaken belief that they had probable cause to arrest for the Privacy Act was reasonable. As Judge Gould's dissent correctly points out, the jury also had plenty of evidence to conclude that the officers acted reasonably in arresting Alford on the Privacy Act charge.

> "While in the field, the officers read the statute, which literally gives support to their arrest of Alford and does not on its face carve out an exception for taping law enforcement officers. Then, with a caution apparently reflecting their concern that they do the right thing, the officers contacted a prosecuting

> attorney to make sure that Alford's conduct indeed violated the Privacy Act. . . . Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop. The officers were not unreasonable in trusting the advice of their prosecuting attorney." App. 17a-18a (footnote omitted).[11]

A proper application of the objective reasonableness standard, under both the Fourth Amendment and the qualified immunity analysis, requires a court to consider all facts and circumstances in the possession of the officers at the time of the arrest. To the contrary, the "closely related offense doctrine" prohibits a court from considering all of the facts surrounding an arrest. Given the widespread utilization of this improper Fourth Amendment and qualified immunity standard, the Circuit courts which apply a related offense rule need to be corrected and instructed to consider all facts under the objective reasonableness

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[11] Although the Petitioner's believe that under *Hunter* this was an issue of law for the court to decide, and accordingly moved for summary judgment on the issue of qualified immunity, the district court sent the issue to the jury pursuant to Ninth Circuit practice. *See* Ninth Circuit Model Civil Jury Instructions 11.3, Qualified Immunity (comment); App. 65a.

The jury returned a general verdict in favor of the defendant law enforcement officers on either the existence of probable cause or qualified immunity, which issues were presented to them by the court's jury instructions.

standard in accordance with this Court's cases cited above.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-35141

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

JEROME ANTHONY ALFORD,

Plaintiff-Appellant,

v.

JOI HANER, a Washington State Patrol Officer; JANE DOE HANER, his wife;

GERALD DEVENPECK, SGT., Washington State Patrol; JANE DOE DEVENPECK, his wife,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington

Robert J. Bryan, District Judge, Presiding

Argued and Submitted
June 14, 2002 – Seattle, Washington
Filed June 23, 2003

Before: James R. Browning, Betty B. Fletcher, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Browning;

Dissent by Judge Gould

SUMMARY

Government Law/Immunity

The court of appeals reversed a judgment of the district court. The court held that no objectively reasonable officer could conclude that arresting a person for tape recording a traffic stop on a public thoroughfare is permissible under the Washington Privacy Act.

Appellant Tony Alford spent the night in jail for tape recording a traffic stop conducted on the shoulder of a highway by appellees Joi Haner, a Washington State Trooper, and his supervisor, Sergeant Devenpeck. The officers were concerned that Alford was pretending to be a police officer and engaging in obstruction. Alford told the officers that he had a copy of a Washington state court opinion in his glove compartment that held that the Washington Privacy Act does not apply to police officers performing official duties. The officers did not look at the case, although they had read the Privacy Act before arresting Alford. Devenpeck related what had occurred to prosecutor Mark Lindquist, but did not tell him about the case Alford had cited. Lindquist advised Devenpeck that there was clearly probable cause for arrest. Since taping police officers during the performance of their public duties was not illegal under the Washington Privacy Act, the charge was dismissed by a state court.

Alford filed suit in federal district court under 42 U.S.C. § 1983, alleging that his arrest, incarceration, and prosecution violated his Fourth

Amendment right to be free from unreasonable seizure, and pursued state law claims for unlawful arrest and imprisonment. The officers claimed they were entitled to qualified immunity and had probable cause for the arrest. Devenpeck testified that at the time of the arrest, his belief that he had probable cause to arrest Alford was based solely on his view that Alford had violated the Privacy Act. Haner admitted that the case Alford cited had previously been mentioned in a law enforcement digest that Haner generally read. Lindquist testified that his probable cause determination was based primarily on conduct other than the tape recording. The jury was instructed that state law clearly established at the time of the incident did not bar the type of recording for which Alford was arrested. Nevertheless, the jury found for the officers and the district court denied Alford's motion for a new trial.

Alford appealed.

The elements of a § 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. There was no dispute about the first element: the officers acted under color of state law.

As to the second element, the Fourth Amendment prohibits arrests without probable cause. Probable cause exists when an officer has a reasonable belief that a crime has been, is being, or is about to be committed. Probable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it

involves the same conduct for which the suspect was arrested. The conduct underlying the crimes suggested by the officers were not closely related to the crime for which officers arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the officers did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, did not cure the lack of probable cause.

The first question under the two-part inquiry for determining whether the officers are entitled to qualified immunity is whether the law governing the official's conduct was clearly established. The officers had to show they could have reasonably believed that their actions were lawful, that is, under the facts presented the officers could have reasonably believed that there was probable cause to arrest Alford for a violation of the Privacy Act (or a closely related offense). The plain language of the Privacy Act, which the officers read before arresting Alford, prohibits only the recording of a private conversation, and the law was clearly established that a traffic stop was not a private encounter. The taping was legal. Under the facts presented, viewed in the light most favorable to the officers, no reasonable officer could think that Alford had recorded a private conversation in violation of the Washington Privacy Act. The officers not only failed to read the clear language of statute and incorrectly decided that the traffic stop on a public thoroughfare was a private conversation, they also declined to read the case Alford offered and did not call it to the attention of the prosecuting attorney. Because in

light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, officers were not entitled to immunity. The district court abused its discretion in not granting the motion for a new trial .The judgment of the district court had to be reversed.

Judge Gould dissented, writing that in light of the district court's submission of the case to a jury that in turn gave verdict of no liability, it is wrong for an appellate court majority to reverse the jury's decision on the incorrect theory that there is insufficient evidence to support the jury verdict.

COUNSEL

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Christine O. Gregoire, Attorney General, Eric A. Mentzer, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

BROWNING, Circuit Judge:

Tony Alford spent the night in jail for tape recording a traffic stop. Since taping police officers during the performance of their public duties is not illegal under the Washington Privacy Act, the charge was dismissed by a state court.

Alford then filed suit under 42 U.S.C. § 1983 alleging that his arrest, incarceration and prosecution violated his Fourth Amendment right to be free from unreasonable seizure, and pursued state

law claims for unlawful arrest and imprisonment. Defendants claimed they were entitled to qualified immunity and had probable cause for the arrest. The jury was instructed that state law clearly established at the time of the incident did not bar the type of recording for which Alford was arrested. Nevertheless, the jury found for the defendants and the district court denied Alford's motion for a new trial. Alford appeals. We reverse and remand.

I. Facts & Procedural History

While driving to his night job, Alford noticed a disabled car on the shoulder of a highway. The area was dark and deserted and he pulled over to offer assistance. After helping the motorists jack up their car and giving them a flashlight to use, he began walking back to his car.

Defendant Joi Haner, a Washington State Trooper, driving in the opposite direction, had observed the disabled vehicle and Alford's car pulling in behind it. Haner turned around at the first opportunity.

When Haner arrived, he saw Alford walking back toward his own car. Alford told Haner that the people in the car had a flat tire and that he had given them a needed flashlight. Alford then drove off and Haner went to check on the occupants of the stranded vehicle.

The motorists told Haner that they believed Alford was a police officer, in part because his car had "wig-wag" headlights (headlights that flash alternately). Because Haner was concerned that Alford was pretending to be a police officer, he called his supervisor, Sergeant Devenpeck, and drove off in

pursuit of Alford. After pulling Alford over, Haner noticed that Alford's license plate was nearly unreadable because of a tinted license plate cover. Haner also saw that Alford had an amateur radio broadcasting the communications of the Kitsap County's Sheriff's Office, a microphone attached to the radio, a portable police scanner, and handcuffs.

Haner asked Alford about the wig-wag headlights and Alford responded that they were part of an alarm system that had been installed that day. Haner then ordered Alford to demonstrate the wig-wag lights, Alford pressed several buttons, but was unable to activate the lights. Haner noticed that Alford had not pushed a button near Alford's right knee, but did not ask Alford to do so. Later, another officer pushed the button and activated the wig-wag lights.

When Sergeant Devenpeck arrived he also asked Alford about the wig-wag lights. While talking with Alford, Devenpeck noticed a tape recorder on the passenger seat recording the traffic stop. Devenpeck told Haner to remove Alford from the car, and informed Alford that he was under arrest for making an illegal tape recording.

Alford told the officers that he had previously had a similar problem with the Kitsap County Sheriff and that he had a copy of a Washington Court of Appeals opinion in his glove compartment which held that the state Privacy Act does not apply to police officers performing official duties. The officers did not look at the case. Officer Devenpeck later testified that at the time of the arrest, his belief that he had probable cause to arrest Alford was

based solely on his view that Alford had violated the Privacy Act.

When Alford was on his way to jail, Devenpeck called Deputy Prosecuting Attorney Mark Lindquist. Devenpeck related what had occurred but did not tell Lindquist about the case Alford had cited. Lindquist advised Devenpeck that there was "clearly probable cause" for arrest, but at trial Lindquist testified that this determination was based primarily on conduct other than the tape recording. Officer Haner also later admitted that the case Alford cited had previously been mentioned in a law enforcement digest that Haner generally read.

Alford was jailed for the night on the charge of making an illegal audio recording of a private conversation without knowledge or consent. His car was towed and impounded. A state court judge later dismissed the charge.

Alford filed a complaint in federal district court against both the officers and the Washington State Patrol. The Patrol was later dismissed. Alford presented two claims to the jury, a § 1983 claim and a state law claim for unlawful arrest and imprisonment. The jury found for the defendants. The district court denied Alford's motion for a new trial.

II. Motion for a New Trial

We review a district court's ruling on a motion for a new trial for abuse of discretion. *U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). We will reverse the denial of a new trial where, as here, there is no evidence to support the jury's verdict. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174,

1189-90 (9th Cir. 2002); *see also De Saracho v. Custom Food Mach. Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

The elements of a section 1983 action are: (1) that "the conduct complained of was committed by a person acting under color of state law;" and (2) that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).[1] [There is no dispute about the first element: the defendants acted under color of state law.

As to the second element, Alford argues that he was deprived of his constitutional right to be free from unreasonable seizure. The Fourth Amendment prohibits arrests without probable cause. *See Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Probable cause exists when an officer has "a reasonable belief . . . that a crime has been, is being, or is about to be committed." *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 527 (9th Cir. 1991) (internal quotation marks omitted). Tape recording officers conducting a traffic stop is not a crime in Washington. *See* Wash. Rev. Code § 9.73.030(1)(b) (prohibiting recording of private conversations);

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[1] The elements of Alford's state law claim were similar. As stated in the jury instructions, Alford had to show that defendants (1) arrested Alford without probable cause; (2) acted under color of law; and (3) proximately caused Alford's injuries. Because these elements are so similar to the § 1983 claim, and we reach the same result for both his state and federal claims, we do not discuss them separately.

State v. Flora, 68 Wash. App. 802, 845 P.2d 1355 (1992) (finding that recording an arrest made by public officers performing functions on public thoroughfares did not violate Washington law because the arrest did not constitute a private conversation). Here, the jury was instructed that an arrest made without probable cause was unreasonable and that, under clearly established law, the conduct for which Alford was arrested was not a violation of the Privacy Act.

Since they did not have probable cause to arrest Alford for violating the Privacy Act, defendants now claim on appeal that they had probable cause to arrest Alford for offenses other than tape recording and therefore, Alford's rights were not violated. The defendants cite a 1973 Fifth Circuit case for the proposition that an arrest may be valid, even if there was not probable cause to arrest for the particular crime cited, if there was probable cause to arrest a person for *some* criminal offense. *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973). Whatever the rule may have been in that Circuit, this is not the test applied in the Ninth Circuit. In this Circuit, "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994) (emphasis added), *cert. denied sub. nom., Ball v. Gasho*, 515 U.S. 1144 (1995).

The conduct underlying the crimes suggested by the defendants is unrelated to Alford's tape recording. Any impersonation charge would be based on Alford's use of wig-wag headlights. An obstruction

charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how to do so. These offenses are not closely related to the crime for which defendants arrested Alford, nor was the conduct required for impersonation and obstruction similar to the conduct for which Alford was arrested: tape recording a traffic stop. Since the defendants did not have probable cause to arrest Alford for a violation of the Washington Privacy Act, probable cause to arrest for other unrelated offenses, if present, does not cure the lack of probable cause here. *Gasho*, 39 F.3d at 1428 n.6.

The defendants argue that a reasonable officer would have believed Alford was violating the state privacy law and therefore they are entitled to qualified immunity. The first question under the two-part inquiry for determining whether the officers are entitled to qualified immunity is whether the "law governing the official's conduct [was] clearly established." *Act-Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The plaintiff bears the burden of making this showing. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). For qualified immunity purposes, "the contours of the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken, a reasonable official would understand that what he is doing violates that right;" and "in the light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quotations omitted). Here, the jury was instructed that Washington law permitting the tape recording of a traffic stop was clearly established: "It is not a violation of the Washington Privacy Act to

tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not 'private' under the Privacy Act. This rule of law was clearly established by Washington Courts in 1992 in the case of *State of Washington v. Flora.*" Since Alford met his burden of showing that the law was clearly established, "the burden shift[ed] to the defendant[s] to show that a reasonable police officer could have believed, in light of the settled law, that he was not violating a constitutional right" by arresting Alford for illegal tape recording. *See Gasho,* 39 F.3d at 1438.

Under this "objective reasonableness" test, *Mendoza,* 27 F.3d at 1360, the officers' subjective intent or beliefs are essentially irrelevant; the proper inquiry is whether in light of the facts and circumstances confronting the officers, it was objectively reasonable to conclude that Alford's arrest for a violation of the Privacy Act was supported by probable cause. *See Anderson v. Creighton,* 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Mendoza* at 1362. While "[o]ur prior determination that the arrest[ ] lacked probable cause is not necessarily determinative," *Gasho* at 1439, the officers must still show "they could have reasonably believed that their actions were lawful," *id.,* that is, under the facts presented the officers could have reasonably believed that there was probable cause to arrest Alford for a violation of the Privacy Act (or a closely related offense). *See id.* at 1428 n.6, 1439.[2]

[2] We reject the officers' argument that they are entitled to qualified immunity if probable cause could have existed for other, unrelated offenses. As with our earlier determination that the arrest without probable cause violated Alford's rights, probable cause to arrest Alford for other unrelated offenses, if present, does not render his arrest lawful or objectively reasonable for the purpose of allowing the officers to invoke the shield of qualified immunity. *See Gasho* at 1428 n.6, 1439. Even if we were not compelled by our precedent to consider only whether probable cause may have existed for closely related offenses based on the same conduct for which Alford was arrested, to hold otherwise would improperly turn the objective reasonableness inquiry into an inquiry into the officers' subjective motivations or beliefs at the time of arrest. *See, e.g., Trejo v. Perez,* 693 F.2d 482, 486 (5th Cir. 1982) (finding requirement of "objective reasonableness" best vindicated by limiting the probable cause determination for qualified immunity purposes to "sufficiently related offenses" because this limitation incorporates an "objective [reasonableness] standard for avoiding after the fact extrapolation" that "obviates the need for a delicate subjective inquiry"). Because the "closely related offense" doctrine already accounts for the possibility of sham arrests or later extrapolated justifications, and correctly focuses on the objective reasonableness of an arrest, we cannot introduce a further inquiry into the officers' subjective beliefs or motivations at the time of the arrest. It would eviscerate the "objective reasonableness" standard, and the "closely related offense" doctrine, to allow the officers to invoke qualified immunity by claiming reliance on probable cause for other uncharged and unrelated offenses.

Defendants argue they reasonably believed what they were doing was lawful and other officers have thought that surreptitious recording of a traffic stop was illegal. But the defendants mistakenly define "reasonable," focusing on their good faith and subjective beliefs as to the legality of their conduct instead of whether it was objectively reasonable to arrest Alford for a violation of the Privacy Act.[3] The

[3] Similarly, the dissent emphasizes the officers' subjective beliefs about the scope of the law and their conduct rather than the objective reasonableness of their actions in light of the facts and clearly settled law. Since defendants have

facts presented show that Alford taped a traffic stop on a public thoroughfare. There is no dispute that when the taping occurred the officers were performing a public function. The plain language of the Privacy Act, which the defendants read before arresting Alford, prohibits only the recording of a private conversation, and the law was clearly established that a traffic stop was not a private encounter. The taping was legal. There was no evidence that *Flora* could be distinguished or that a reasonable officer could think that the arrest was a private conversation.[4] Devenpeck testified that he

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alleged no facts that would show that it was objectively reasonable to arrest Alford for violating the Privacy Act, their subjective beliefs are not sufficient to meet their burden under the qualified immunity standard. *See DeNieva v. Reyes*, 966 F.2d 480 (9th Cir. 1992) (finding defendant's assertions of good faith, without facts or law showing his actions were objectively reasonable, were not sufficient to show that a reasonable officer could have believed his conduct lawful).

[4] The dissent's suggestion that the statute "literally gives support" to the officer's arrest is not borne out by the text of the Privacy Act. The Act plainly prohibits only the recording of a "[p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all the persons engaged in the conversation," Wash. Rev. Code § 9.73.030(1)(b). A plain reading of the Washington Privacy Act does not imply that a privacy interest is created when an officer stops an individual on a public thoroughfare for a traffic violation. In fact, such a view has been rejected as "wholly without merit." *Flora*, 845 P.2d at 1357. In finding that the officers in *Flora* "could not reasonably have considered their words private" while performing a public function on a public thoroughfare, *id.* at 1358, the *Flora* court did not, as the dissent suggests, "differ from express statutory language" of the Privacy Act or narrow the scope of the statute. On the contrary, the *Flora* court merely complied with the intent of the statute, which "reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law

arrested Alford because Alford had been *hiding* the tape recorder. But no reasonable officer would think that hiding the tape recorder would create a privacy interest for the officer. In fact, *Flora*, 845 P.2d at 1356, involved a hidden tape recorder. Under the facts presented, viewed in the light most favorable to the officers, no reasonable officer could think that Alford had recorded a private conversation in violation of the Washington Privacy Act. *See id.* at 1358 (finding that police officers performing a public function on a public thoroughfare "could not reasonably have considered their words private").

Nevertheless, the defendants argue that they made a reasonable mistake of law and therefore are entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). In *Katz*, the Supreme Court held that officers who make "reasonable mistakes as to the legality of their actions" can invoke qualified immunity. *Id.* at 206. Although *Katz* was a case involving excessive force, the Court made it clear that the same rationale would apply to an officer's probable cause determination. *Id.* However, *Katz* was based on the idea that police officers will sometimes have difficulty drawing fine legal distinctions under exigent circumstances. *See id.* at 205-06.

The legal distinction the officers were asked to make here was not a difficult one: taping private conversations is illegal, taping a traffic stop is not.

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enforcement," *State v. Fjermestad*, 114 Wash. 2d 828, 791 P.2d 897, 902 (1990), and declined the state's invitation "to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity." *Flora* at 1358.

Furthermore, this is not a case of exigent circumstances. Alford was in his car with a tape recorder, the officers read the applicable statute, and Alford even offered the officers a copy of the relevant case which he had in his glove compartment. The officers not only failed to read the clear language of statute and incorrectly decided that the traffic stop on a public thoroughfare was a private conversation, they also declined to read the case Alford offered and did not call it to the attention of the prosecuting attorney. *Katz* is intended to apply with regard to an officer's exercise of discretion rather than his or her faulty grasp of or memory about what the law is. *See id.* at 205-06. Because in light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, defendants were not entitled to immunity.

III. Conclusion

Defendants arrested Alford for tape recording a public conversation, but the law clearly prohibits only the recording of private conversations. Probable cause to arrest for other crimes does not cure the defendants' violation of Alford's rights. *Gasho,* 39 F.3d at 1428 n.6.

The facts and the law clearly established that the traffic stop was public. There was no evidence that Alford had violated the Privacy Act or that the encounter was private. No objectively reasonable officer could have concluded that taping an officer during a traffic stop on a public thoroughfare was barred by the Privacy Act.

We conclude that on the evidence presented, viewed in the light most favorable to defendants, it

was not possible to rule for the defendants. The district court abused its discretion in not granting the motion for a new trial. We reverse and remand to the district court for further proceedings consistent with this decision.

REVERSED AND REMANDED.

GOULD, Circuit Judge, dissenting:

I respectfully dissent, believing that the determination of reasonableness is in the province of the jury. Indeed, I cannot help but think that Congress would shudder to see 42 U.S.C. § 1983 interpreted here to provide for liability and for the potential of a monetary remedy against the law enforcement officers, here state troopers, who quite obviously were doing their job to protect the public.

The officers whom the majority would tag with liability, despite an exculpatory jury verdict in the officers' favor, here stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least. After stopping and questioning Alford, following his abrupt departure from the vicinity of a stalled motorist who had been led by Alford's flashing vehicle lights to believe Alford was a police officer, the real officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted.

Officer Haner and Sergeant Devenpeck reasonably believed Alford's tape recording of the traffic stop was outlawed by the Washington Privacy Act. While in the field, the officers read the statute, which literally gives support to their arrest of Alford

and does not on its face carve out an exception for taping law enforcement officers.[1] Then, with a caution apparently reflecting their concern that they do the right thing, the officers contacted a prosecuting attorney to make sure that Alford's conduct indeed violated the Privacy Act. The officers did not arrest Alford on a rogue mission, nor motivated by malice, nor on a whim; instead, they provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him. Even the prosecuting attorney mistakenly believed that the Privacy Act outlawed the covert tape recording by Alford of the officers' investigatory stop. The officers were not unreasonable in trusting the advice from their prosecuting attorney instead of relying on the assertions of Alford that case law to be found in his glove compartment exonerated him.

The majority argues that an officer, acting in good faith, could not reasonably believe that the text of the Privacy Act, on its face, supports an arrest

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[1] The pertinent portions of the Washington Privacy Act read:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

Rev. Code Wash. [sic] (ARCW) § 9.73.030(1)(b).

under these circumstances, because the statute prohibits the recording of "[p]rivate conversations." The conversation that Alford recorded took place on a lonely stretch of road, at night, with nobody present except for Alford and the two officers. From an objective point of view, it could be reasonable for a jury to conclude, when viewing the facts in the light most favorable to the government, that the officers who read the literal language of the statute, who were unaware of an intermediate appellate court precedent, and who received supportive advice from the city's prosecuting attorney, had a reasonable belief that Alford's conduct violated the Privacy Act. In common sense and common parlance, one might say that two officers talking to a suspect alone in an automobile at roadside on a secluded highway, with no one else present, were engaged in a "private conversation" that could invoke the Privacy Act. The crux of the issue is whether it is a reasonable mistake of law for officers not to abide by an interpretive appellate precedent of which they were not aware.

What is most troubling to me about this case is that the majority does not give adequate heed to the fact that the district court permitted this case to go to the jury, and the jury, given instructions to which Alford did not object and that are not at issue on appeal, found no liability. In light of the district court's submission of this case to a jury that in turn gave a verdict of no liability, it is wrong for an appellate court majority to reverse the jury's decision

on the incorrect theory that there is insufficient evidence to support the jury verdict.[2]

The evidence now is to be viewed in the light most favorable to the officers, as it must be after a favorable jury verdict and a motion for a new trial. There is no challenge to the jury instructions. The trial court determined that the Washington appellate court's 1992 decision in *Washington v. Flora* held that conversations with police officers are not "private" under the state Privacy Act, that this "rule of law was clearly established," and the district court so instructed the jury. Yet the jury still had the right to make a determination that the officers' conduct may have been reasonable if a reasonable mistake was made about the law.

The majority in substance slaps a strict liability theory on law enforcement officers who misunderstand the law of statutory interpretation. This is incorrect. The reason that the arrest turned out to be illegal here was that the broad literal text of the privacy statute had been interpreted restrictively by an intermediate state appellate court in an opinion that was not known by the officers or familiar to the prosecuting attorney.[3] It is

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[2] The majority's theory is also contrary to our precedent in *Thorsted v. Kelly*, 858 F.2d 571, 574-75 (9th Cir. 1988) ("although the . . . inquiry, whether legal rights have been settled, may often best be resolved by the trial judge, . . . the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact.") (citations omitted).

[3] The *Flora* opinion was rendered by the Washington intermediate Court of Appeals, Division I, whereas the officers here worked in Pierce County, within an area controlled by the Washington Court of Appeals, Division II, and *Flora* was not a

impractical and unjust to expect that in every case every law enforcement officer will know every legal decision written by every level of the state courts about every law. To be sure, officers may not reasonably be ignorant of well-established constitutional principles, such as the need for probable cause to arrest. But here, the officers were aware they needed probable cause to arrest. Their mistake was that they interpreted a state statute literally despite a state court ruling that had narrowed it.

The majority's strict liability rule oppresses law enforcement, and relies on an unworkable legal fiction that presumes police officers must be aware of all state court of appeals decisions bearing on law enforcement. In my view, it is not correct to assume that officers necessarily can become familiar with all appellate opinions that change the contours of the law to differ from express statutory language. *See Ganwich v. Knapp*, 319 F.3d 1115, 1125 (9th Cir. 2003) ("It may be argued that judges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision. *We do not expect police officers to do those things.*") (emphasis added). To attach per se liability on that theory cannot be justified by the intent of Congress in passing civil rights laws or by the Supreme Court's established precedent, or ours, properly viewed. Reasonableness of government conduct is at the core of the inquiry on liability. And

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state supreme court case controlling all intermediate appellate courts.

reasonableness is a fact question for a jury. The officers here, who read a statute before making an arrest, saw it literally covered the challenged conduct, and double-checked with a prosecuting attorney, were acting reasonably, even if it turned out the officers' belief about the law was incorrect.

The jury had plenty of evidence to conclude that the officers acted reasonably, as defined by the jury instructions to which Alford did not object. I would uphold the jury's verdict. I must respectfully dissent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Aug 08 2003
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JEROME ANTHONY ALFORD, Plaintiff – Appellant, v. JOI HANER, a Washington State Patrol Officer; et al., Defendants – Appellees.	No. 01-35141 D.C. No. CV-99-05586-RJB Western District of Washington, Tacoma ORDER

Before: BROWNING, B. FLETCHER, and GOULD, Circuit Judges

A majority of the panel has recommended against granting the petition for rehearing en banc. Judge Gould voted to grant the petition for rehearing en banc. Judge Browning and Judge B. Fletcher recommended against granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

FILED
MAY 28, 2003
CATHY A. CATTERSON
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ANTHONY ALFORD, Plaintiff-Appellant, v. JOI HANER, a Washington State Patrol Officer, et al., Defendants-Appellees.	No. 01-35141 D.C. No. CV-99-05586-RJB Western District of Washington, Tacoma ORDER

At oral argument on June 14, 2002, counsel should be prepared to discuss the effect, if any, on this appeal of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994).

FOR THE COURT:

CATHY A. CATTERSON
CLERK OF COURT

By: //s//
Rhonda Roberts
Deputy Clerk

FILED
Jan 10 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. GERALD DEVENPECK, JOI HANER, et al., Defendants.	Case No. C99-5586RJB ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

THIS MATTER comes before the court on the above-referenced motion. The court has considered the records and files herein, plaintiff's motion, and the events of the trial. Response from the defendants is not necessary.

The court is satisfied that there was a legally sufficient evidentiary basis to support the jury's verdict for the defendants. Accordingly, the motion should be denied.

It is so **ORDERED.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of

record and to any party appearing *pro se* at said party's last known address.

DATED this 10th day of January, 2001.

//s//
ROBERT J. BRYAN
U. S. District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

JEROME ANTHONY ALFORD, v. JOI HANER and LISA HANER, his wife; and GERALD DEVENPECK and JANE DOE DEVENPECK, his wife,	JUDGMENT IN A CIVIL CASE Case Number: 99-5586RJB

[XX] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict as follows:

The jury finds FOR defendants and against the plaintiff.

FILED
Jan 05 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

Jan. 5, 2001
Date

//s// [Bruce Rifkin]
Clerk

//s// [Jean Bering]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED
Nov 30 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

JEROME ANTHONY ALFORD, Plaintiff, v. WASHINGTON STATE POLICE, JOI HANER, GERALD DEVENPECK, ANNETTE SANDBERG, CHRIESINE GREGOIRE, Defendant.	Case No. C99-5586RJB ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants Motion for Summary Judgment (Dkt. #35). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

A. SUMMARY JUDGMENT STANDARD

Summary Judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R Civ. P. 56(c). The moving party is entitled to judgment as a matter

of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S.242, 253 (1986); *T.W. Elec. Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service, Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service, Inc.*, 809 F.2d at 630 (relying on *Anderson*,

supra). Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed". *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. RELEVANT FACTS

On November 22, 1997, plaintiff had stopped to help a disabled vehicle on the shoulder of SR 16. He had given the stranded motorist a flashlight to use, and then continued on his way. State Patrol Trooper Joi Haner, who had noticed the disabled vehicle and had seen plaintiff's car pull in behind the disabled vehicle, turned around and pulled in behind plaintiff's car. As Haner got out of his car, plaintiff returned to his own car and left the scene. One of the individuals in the stranded car informed Officer Haner that the automobile that had stopped to assist them had "wig-wag" headlights (headlights that flash in an alternating manner), which are illegal under Washington law.

Officer Haner requested backup assistance, and pursued and stopped plaintiff on Highway 16. Officer Haner noted that the license plates on plaintiff's car were unreadable due to a dark-tinted license plate cover; a small amateur radio was installed with a microphone attached, with which plaintiff was monitoring Kitsap County Sheriff's Office communications; plaintiff had a portable police scanner on the seat next to him; and plaintiff told Haner he had handcuffs but that he did not have a gun in the car.

Officer Haner inquired about whether plaintiff had "wig-wag" headlights. Plaintiff told him that the headlights were not "wig-wag" lights but were part of

his alarm system. When the officer asked him to turn on the lights, plaintiff was unable to do so.

Officer Devenpeck arrived to assist Haner, and plaintiff was asked about the headlights. Plaintiff told them that the alarm system had just been installed that day and he did not know how to operate them. At some point during the discussions, Devenpeck noticed a shiny black object on the seat next to the driver's seat. He noticed that the device was a tape recorder with the play and record button depressed and apparently operating. When he rewound the tape, Devenpeck could hear that both his voice and plaintiff's voice had been recorded. In fact, the tape recorder had been operating since Haner had stopped the vehicle.

The facts diverge at this point. Plaintiff states that, when Devenpeck found the tape recorder, he immediately arrested plaintiff for illegal tape recording under RCW 9.73.030. Dkt. #39, Transcript of Plaintiff's Tape Recording, at 14. Devenpeck states that, before he arrested plaintiff, he called a Deputy Prosecutor for an informal legal opinion, and arrested plaintiff after he had received the legal advice. Dkt. #31, Exh. 2. Neither Devenpeck nor Haner's investigative reports refer to any consultation before plaintiff was arrested. Dkt. #39, Investigation Reports of Devenpeck and Haner.

Plaintiff informed the officers that he had been in a similar situation before with the Kitsap County Sheriff's Office, and that he had a copy of the applicable statute and a copy of *State v. Flores* [sic] in the car. He directed Devenpeck to the glove box

where these items were located. The officers did not follow up on plaintiff's offer.

While Devenpeck was inventorying the vehicle for impound, he located a switch under the steering column that appeared to be a "wig-wag" activation switch. He turned the switch on and the high beams of the headlights started flashing in an alternating manner. Plaintiff was cited for violation of RCW 46.37.280. He was taken to jail where he spent the night, and his car towed and impounded. The charges were later dismissed by the Pierce County District Court.

C. CLAIMS

Plaintiff claims defendants (1) arrested, filed false charges, and used excessive force against him in violation of the Fourteenth Amendment; (2) searched and seized him without probable cause and searched his vehicle without a warrant, in violation of the Fourth and Fourteenth Amendments; (3) incarcerated him without probable cause, in violation of the Fourteenth Amendment; (4) falsely arrested him without probable cause; and (5) falsely imprisoned him without probable cause. Dkt. #27, at 5-6.

D. STANDARD FOR STATING A CLAIM UNDER 42 U.S.C. § 1983

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United

States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

D.[sic] ISSUES

1. Are the claims against the Washington State Patrol and other named defendants sued in their official capacities barred on the basis of Eleventh Amendment immunity and/or for failure to name a person capable of being sued under 42 U.S.C. § 1983?

2. Should the claims against Annette Sandberg in her personal capacity be dismissed for failure to demonstrate personal participation?

3. Are defendants Devenpeck and Haner entitled to qualified immunity?

E.[sic] DISCUSSION

1. Claims against Washington State Patrol and Defendants Named in their Official Capacities.

Plaintiff has named the Washington State Patrol as well as individual defendants-Christine Gregoire, Annette Sandberg, Joi Haner and Gerald Devenpeck – in their official capacity.

Plaintiff's claims against the Washington State Patrol is barred by the Eleventh Amend-

ment. The Eleventh Amendment to the United States Constitution bars a person from suing a state in federal court without the state's consent. *See Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114, 1131 (1996); *Natural Resources Defense Council v. California Dep't of Transportation,* 96 F.3d 420, 421 (9th Cir. 1996). Eleventh Amendment immunity extends to state agencies. *Pennhurst State Sch. & Hosp. v. Holdeman,* 465 U.S. 89, 101-102 (1984). Eleventh Amendment immunity is not automatically waived in actions brought under 42 U.S.C. § 1983. *Quern v. Jordan,* 440 U.S. 332 (1979). Washington has not waived the protection of the Eleventh Amendment. *Edgar v. State,* 92 Wn.2d 217 (1979). The claim against the Washington State Patrol should be dismissed.

Plaintiff's claims against individuals in their official capacities are not cognizable in a civil rights action. Neither states nor state officials acting in their official capacities are persons for purposes of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 48, 71 (1989). Because they are not persons within the meaning of § 1983, plaintiff has not stated a cause of action against any of the named individuals acting in their official capacities. The claims against Christine Gregoire should be dismissed. The claims against Annette Sandberg, Officer Devenpeck and Officer Haner in their official capacities should be dismissed.

2. Claims Against Annette Sandberg in Personal Capacity.

Plaintiff claims Annette Sandberg, Chief of the Washington State Patrol, in her individual capacity,

exhibited deliberate indifference when she failed to properly train, evaluate, and supervise police officers regarding their treatment of individuals, particularly in regard to the right of individuals to tape record actions of State patrol officers during stops, detentions, and arrests.

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe,* 616 F.2d 1089, 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights violation are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents,* 673 F.2d 266 (9th Cir. 1982). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694 n.58 (1978); *Padway v. Palches,* 665 F.2d 965 (9th Cir. 1982). In this case, plaintiff has not pled facts sufficient to connect Sandberg with his arrest. His allegations regarding her failure to train, evaluate, and supervise officers are conclusory; he does not set forth any factual basis for the claims. In his response, plaintiff has not presented any factual argument regarding Sandberg's personal participation. The allegations against Annette Sandberg in her personal capacity should be dismissed.

3. Qualified Immunity of Officers Devenpeck and Haner.

Officers Devenpeck and Haner have also been sued in their individual/personal capacity. Defendants maintain officers Devenpeck and Haner

are entitled to qualified immunity because, at the time they made the stop and subsequent arrest, the law was not clearly established that individuals were permitted under the law to tape record police officers. In addition, defendants claim officer Devenpeck sought and acted upon legal advice after he discovered the tape recorder but before he arrested plaintiff for violation of RCW 9.73.030.

Defendants are entitled to qualified immunity from damages for civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id.* at 819.

In analyzing a qualified immunity defense, the Court must determine: (1) what right has been violated; (2) whether that right was so "clearly established" at the time of the incident that a reasonable officer would have been aware of its constitutionality; and (3) whether a reasonable public officer could have believed that the alleged conduct was lawful. *See Gabbert v. Conn*, 131 F.3d 793, 799 (9th Cir. 1997); *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

To be clearly established, the law must be sufficiently clear that a reasonable official would understand that his or her action violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The court should look to whatever decisional law is available to determine whether the law was clearly

established at the time the alleged acts occurred. *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

A. Constitutional Right Allegedly Violated.

Plaintiff claims the police in this case violated his Fourth and Fourteenth Amendments by arresting him without probable cause. The Fourth Amendment guarantees people the right to be free from unreasonable search and seizure. Police may arrest a person without a warrant if the arrest is supported by probable cause. *See United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989). Probable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime. *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992)(probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime." *United States v. Hoyos*, 892 F.2d at 1392. The question in this case is whether the police violated plaintiff's constitutional rights by arresting him without probable cause.

B. Clearly Established Right

If the law is not clearly established at the time of the alleged conduct, an officer would be entitled to qualified immunity. In this instance, the court must determine whether it was clearly established law at the time of the incident that an individual could not be arrested under RCW 9.73.030 for taping

conversations of police officers, given the circumstances of this case.

RCW 9.73.030 provides:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

In *State v. Flora*, 68 Wn. App. 802 (1992), Division I of the Washington Court of Appeals reversed a conviction after the defendant was convicted of violating RCW 9.73.030 by tape-recording the police officers who investigated and arrested him for violating a restraining order. The Court of Appeals concluded that the intent of this law is to protect individuals from the disclosure of any secret illegally uncovered by law enforcement, not to transform the privacy act into a sword available for use against public officers acting in their official capacity. *Flora*, 68 Wn. App. at 806-807. The court determined that whether a given matter is private requires a fact-specific inquiry, and in Flora's case, where the public officers were performing an

official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby, the officers did not have a privacy interest to assert under RCW 9.73.030. *Flora*, 68 Wn. App. at 807.

Defendant distinguishes this case from *Flora* in two respects: (1) there was no "third-party" present in this case, while Mr. Flora's friend was present when the tape recordings of the officers were being made; (2) plaintiff has not alleged that the conversation in this case took place on a public thoroughfare or that there was anyone within hearing distance. Those distinctions do not undercut the rule in *Flora*. The interaction here occurred on a highway. There is no principled reason for concluding that a highway is any less private than it would have been if the taping had occurred outside of plaintiff's house, as had happened in *Flora*. Whether a third party was present or not, the highway and its shoulder were certainly open and available to other people.

This incident in this case took place in 1997. *Flora* was decided in 1992. It appears that the law was clearly established in 1992 that RCW 9.73.030 would not prohibit taping of the police officers in a situation such as the present one. It was also clearly established that a person could not be criminally arrested or charged with violating RCW 9.73.030 for such conduct.

C. Reasonable Belief that Conduct was Lawful.

The officers in this case could still be entitled to qualified immunity in this case if they reasonably

believed their conduct was lawful. Officer Devenpeck maintains he called a deputy prosecutor and received legal advice upon which the officers acted in arresting plaintiff. Relying on the advice of an attorney may be a factor in considering whether an officer had a reasonable belief that the conduct was lawful. *See Watertown Equipment Co. v. Norwest Bank Watertown,* 830 F.2d 1487, 1495 (8th Cir. 1987). As noted above, the facts on this issue are in dispute. Plaintiff maintains the officers arrested him immediately after they discovered the tape records, and there is evidence to support that claim. Dkt. #39, investigative reports of officers Devenpeck and Haner, and transcript of tape recording. The court notes the deputy prosecutor is not identified nor is there an affidavit from any such prosecutor attesting to the facts in Officer Devenpeck's declaration. Because there exists an issue of fact on whether the officers reasonably believed their conduct was lawful, it is premature to grant qualified immunity to officers Devenpeck and Haner.

Therefore, it is hereby

ORDERED that Defendants' Motion for Summary judgment (Dkt. #35) is **GRANTED IN PART AND DENIED IN PART.** The Claims against the Washington State Police, Christine Gregoire, and Annette Sandberg are **DISMISSED WITH PREJUDICE.** The claims against Officers Joi Haner and Gerald Devenpeck in their official capacities are **DISMISSED WITH PREJUDICE.** Defendants' motion requesting the court to dismiss the claims against Officers Haner and Devenpeck in their individual or personal capacities on the basis of

qualified immunity is **DENIED WITHOUT PREJUDICE.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 29th day of November, 2000.

//s//
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL
Wednesday, January 3, 2001

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* * *

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rules and regulations of the State Patrol.

Q Do you review troopers – with respect to your supervisory responsibilities, do you review trooper's determination of probable cause?

A At the end of every month, the troopers submit all their case reports and all their monthly documentation to the supervisor for review. I closely reviewed their case reports to make sure they were complete and well-written and contained the facts and circumstances that were appropriate to the incident.

Q After you had your telephone conversation with Mark Lindquist, what did you do?

A I called Trooper Haner on the radio and told him that I had spoken with the prosecutor and that he agreed that the arrest was a good, valid arrest.

Q Did you discuss any other matters on the telephone with Mr. Lindquist?

A I don't recall specifically.

Q Any matters relating – any other matters than the Privacy Act, is what I mean. Other possible charges.

A As I recall, Mr. Lindquist said, "Well, it sounds like, based on the runaround the guy gave you, that you should charge him with obstructing." There's a statute for obstructing a public servant, which I can't quote the statute exactly, but if someone delays your investigation based on them not giving you proper information, that that's against the law.

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Now, a defendant doesn't have to make a statement, but if they are making statements to you that cause you to basically chase your tail, that's illegal, according to the statute. And he brought that up, and I said the State Patrol doesn't stack charges, which they don't.

Q What does that mean?

A That if you arrest someone for one reason, if there are other types of things – like I will resort back to a drunk driving case. If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation.

Q Have you ever arrested somebody for one crime and they've been charged with a different one later?

MR. PHILLIPS: Object to relevance on this.

THE COURT: Sustained.

Q [BY MR. MENTZER] Why did you call Mark Lindquist instead of the on-call prosecutor?

A Mr. Lindquist was the prosecutor that worked at the district court in Gig Harbor, which was the court that we worked out of. I had worked with him on several prior cases, and in my, at that time – what, 18 or 19 years? – 18 or 19 years of experience at that time, he was the best prosecutor that I had ever worked with, and I have worked with many, many prosecutors.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL
Thursday, January 4, 2001

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* * *

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MR. PHILLIPS: Not from plaintiff, Your Honor.

MR. MENTZER: I have one.

THE COURT: Yes.

MR. MENTZER: The same one I made in chambers. I haven't yet numbered them. I will try to figure out which one it is.

14, if that is the one, Your Honor. It says, "It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not private under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora*."

We take exception to that instruction with all due respect to the court. We know that was the ruling on our motion for summary judgment, but we believe the Washington Supreme Court in *State v. Clark*, 129 Wn.2d 211, is dispositive and

determinative of that factor. And the critical factor, we believe, is that there were passersby present, and that is what made the difference in *Flora*. In this case there were no passersby, and thus we believe that the *State v. Clark* stands for the proposition that the conversation was private and thus not lawful to record under the Privacy Act.

THE COURT: I appreciate your argument. It is my judgment, as I guess I'm not sure I had said on the record, but

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it's my judgment that the language of the Privacy Act itself requires that a conversation be private before there is a prohibition on one-party-consent recording. It seems to me ultimately clear and plain on the face of the statute, and also in the law that has interpreted it, that when a police officer is making a stop on a public highway that that is not a private conversation. Among other reasons is that everything that is said there is a matter of public interest and public inquiry, including in-court inquiry. There's nothing that can be said, in my view, by either – and this goes beyond this case, but I think there's nothing said under such circumstances by the one stopped or by the police officers that they can reasonably expect will be held private. It's a public officer doing public business with a citizen who is a member of the public, and the citizen should know from the circumstances, as the officers should know from the circumstances, that the conversations would not be expected to be

private. Certainly they would claim it wasn't private if there's a confession on the spot.

So, in any event, that's my view of that issue.

Okay. Are we ready to instruct the jury then?

MR. PHILLIPS: Yes, Your Honor.

MR. MENTZER: Yes, Your Honor.

THE COURT: All right.

[Jury present.]

THE COURT: Ladies and gentlemen, you heard before the

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last long recess here that both parties have rested, meaning they have presented all the evidence that they choose to present in the case, and so it is now time to instruct you on the law.

I told you earlier that you would be allowed to take notes during the presentation of evidence, but not at any other time. So now is the time for you to put your notes away. The only time you have taken notes is when there has been evidence presented to you, and I will ask you to not take further notes. You will be allowed to take those notebooks into the jury room with you.

I do want to just take a second to explain this process.

Jean is going to hand you copies of the instructions and verdict forms. I am going to read the instructions to you. You can read along with me, if you wish, or just listen. Some people have

better comprehension if they read along with a speaker; others find it better to just listen. Either way, it's up to you.

Those copies of the instructions are work copies for you and you can take those into the jury room with you. The original instructions that I read from and that bear my original signature are the instructions that will control your deliberations. If there are any differences between the original instructions and your copies, it's the original ones that control.

Now, I have already, in order to save time in typing, have

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made some interlineations in these instructions. I've just stricken some words out and initialed in the margin. The only reason for that is to save time. Any parts that I have stricken out are not part of the instructions. You are to disregard that.

Also you should be aware that sometime when I read instructions I find typographical errors that I overlooked before or something is wrong. If I do make any changes here in court that are not in your copies, I will let you know what they are as we go along.

But with that introduction, I will instruct you on the law.

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally

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important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return – that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consists of: The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; and the exhibits which have been received into evidence.

Evidence may be direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence of nonexistence of other facts may be reasonably

inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and

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weight.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you

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find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

The plaintiff has two claims: One is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;

2. The defendant action under color of law; and

3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of

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proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendants' acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

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Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting

officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

In pertinent part, the Washington Privacy Act, RCW 9.73.030, provides: ". . . It shall be unlawful for any individual . . . to record any . . . private conversation, by any device . . . without first obtaining the consent of all the persons engaged in the conversation.

And further, section 3, Where consent of all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted; provided, that if the conversation is to be recorded that said announcement shall also be recorded.

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Violation of the Privacy Act is a gross misdemeanor.

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora*.

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

It is the duty of the court to instruct you on the measure of damages. By instructing – and I see a typographical error there I'm going to interline. The word "instruction" in the instruction on line 3 should be "instructing." Let me start

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again.

It is the duty of the court to instruct you on the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a

preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

If you find that before this occurrence the plaintiff had a preexisting condition which made him more subject to injury than

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a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery,

however, for any results which would have normally followed from the preexisting condition had there been no occurrence as complained of in this case.

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply

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because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest

belief about the weight and effect of the evidence simply to reach a verdict.

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

Now attached you will see work copies of the verdict forms. You will only use one verdict form in this case. Use verdict form A if you find for the plaintiff and against either or both defendants on either or both of plaintiff's claims. And if you use verdict form A, you will fill in that "We, the jury, find for the plaintiff and against defendants," and write in the name of any defendant that you find against, "and find plaintiff's damages to be," and there you would write in a number as indicated.

If you find for defendants and against plaintiff, you will use verdict form B only, and it simply reads, "We, the jury, find for both defendants and against plaintiff."

Now, let me say a couple of other things before we turn to argument.

There's a buzzer in the jury room that buzzes into chambers, so that after you start to deliberate on the case you should not

* * *

[Office of the Attorney General of Washington Letterhead]

May 28, 2003

Ms. Cathy Catterson, Clerk
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1525

Re: *Alford v. Haner*, Ninth Circuit Cause No. 01-35141 / Citation to Supplemental Authorities.

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), the Appellees bring the following pertinent and significant authority to the Court's attention.

Bingham v. City of Manhattan Beach, No. 01-56044, Filed May 19, 2003 (9th Cir.), pages 6593-6599; (Discussion that officers were entitled to qualified immunity for arrest of plaintiff when arrest is supported by probable cause for crime other than the crime for which plaintiff was arrested by officers).

This additional authority is a Ninth Circuit discussion of the issue this court asked the parties to be prepared to discuss at oral argument regarding the dicta of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994) and supports Defendants'/ Appellees' argument that Defendants/Appellees were entitled to qualified immunity when the jury found that reasonable officers could have determined that

probable cause existed for crimes other than that for which Plaintiff/Appellant was originally arrested (discussed on pages 10-17 of Defendants'/Appellees' Corrected Brief). It is undisputed in this case that the officers considered the possibility of charging other crimes at the time of the arrest of Appellant. *See* Defendants'/Appellees' Corrected Brief pages 25-26.

Respectfully submitted,

//s//

Eric Mentzer, WSBA# 21243
Assistant Attorney General

cc: R. Stuart Phillips w/enc.

INSTRUCTION NO. 10
[U.S.D.C. W.D. Wash. Jury Instruction]

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional.

2. The defendant acted under color of law; and

3. The acts or omissions of this defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendant's acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff were lawful, and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff as the burden of proof on a claim, you verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

INSTRUCTION NO. 12
[U.S.D.C. W.D. Wash. Jury Instruction]

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

INSTRUCTION NO. 14
[U.S.D.C. W.D. Wash. Jury Instruction]

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of *State of Washington v. Flora.*

Ninth Circuit Mod[illegible] Civil Jury Instructions

11.3 QUALIFIED IMMUNITY

Comment

Qualified immunity is ordinarily a question of law for the court and should be decided at the earliest possible point in the litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (reversing Ninth Circuit holding that qualified immunity was a question of fact for the jury). However, issues of fact may need to be determined by the trier of fact before the court can make a determination on qualified immunity. *See Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001); *Sloman v. Tadlock*, 21 F.3d 1462, 1467-68 (9th Cir. 1994) (noting that the question of whether the judge or jury should be the ultimate determiner of qualified immunity, once disputed foundational facts have been decided by the jury, is as yet unresolved); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993) (holding that qualified immunity becomes a jury question only where a genuine issue of fact exists preventing the determination of qualified immunity at summary judgment).

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wash. Rev. Code.9.73.030.
Intercepting, recording, or divulging private communication– Consent required–Exceptions

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or

actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any

such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

Wash. Rev. Code 9A.60.040
Criminal impersonation

(1) A person is guilty of criminal impersonation in the first degree if the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose; or

(b) Pretends to be a representative of some person or organization or a public servant and does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose.

(2) Criminal impersonation in the first degree is a gross misdemeanor.

(3) A person is guilty of criminal impersonation in the second degree if the person:

(a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and

(b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person

would believe the person is a law enforcement officer.

(4) Criminal impersonation in the second degree is a misdemeanor.

Wash. Rev. Code 9A.76.020
Obstructing a law enforcement officer

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

(2)

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No. 03-710

IN THE

Supreme Court of the United States

GERALD DEVENPECK, a Washington State Patrol Officer,
JOI HANER, a Washington State Patrol Officer,
and their marital communities,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15, Respondent, Jerome Anthony Alford, submits this Brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Under the Fourth Amendment's protection against unreasonable search and seizure, a constitutional violation occurs if the arresting officer lacked "probable cause" to make the arrest. This means that an arrest is unlawful if, using the objective standard of a reasonable law enforcement officer, the facts did not justify an arrest.

In this case, the law was clearly established that tape-recording one's public interactions with law enforcement was not a violation of the Washington Privacy Act. The officers' later attempts to justify the arrest based on conduct separate, and distinct, from that giving rise to the arrest were rebuffed by the Court of Appeals. Although the officers can be entitled to qualified immunity for using improper legal nomenclature in charging or booking if the underlying conduct was criminal, they are not entitled to rationalize a bad arrest by dredging up any illegal conduct that the plaintiff might have (at some time) committed. This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity.

A. Factual Background

On the evening of November 22, 1997, Tony Alford, an employee at the Puget Sound Naval Shipyard, was on his way to his second job as a bouncer. App. 6a. Noticing a car broken down by the side of the road, he stopped and offered to help. App. 6a. After a few minutes, he left, but only after

helping the young men jack up their car, and giving the stranded motorists a flashlight to use. App. 6a. Immediately after he left, he was followed and stopped by Joi Haner, a Washington State Trooper, for questioning about his "wig wag" headlights. App. 6a-7a.

In order to protect himself from harassment and in order to use as evidence, Mr. Alford was carrying a tape-recorder in his car. App. 7a. When stopped that night, he turned it on. App. 7a.

When questioned about his headlights, Mr. Alford informed the Trooper that a local dealer had just installed a new alarm system that very day, and that he was unsure of how it operated. App. 7a.

Sergeant Devenpeck arrived on the scene, and he and Haner came to the car while Devenpeck interrogated Mr. Alford about his headlights. App. 7a. After several minutes, Devenpeck noticed that Mr. Alford had been tape-recording the traffic stop. App. 7a. He immediately placed Mr. Alford under arrest for "illegal tape recording," stating that he could not record the stop without the officer's consent. App. 7a.

Mr. Alford told the officers that he had been through this before with the Kitsap County Sheriff's Office, and had with him both a copy of the applicable statute and a copy of *Washington v. Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992), a Washington Court of Appeals case holding that the Privacy Act does not protect police officers on the job. App. 7a. The officers would not look at the case. App. 7a.

At the jail, Mr. Alford was charged with a violation of RCW 9.73.030, illegally recording a private conversation without consent. Mr. Alford's car was towed and impounded, and he was forced to spend the night in jail. App. 8a. A District Judge later dismissed both the traffic citation and the charge. App. 8a.

B. Procedural History

On November 12, 1999, Mr. Alford filed an action under 42 U.S.C. § 1983 alleging that the arrest, incarceration and prosecution violated his rights under the Fourth Amendment, as well as for certain state law claims. App. 8a.

On November 30, 2000, a defense Motion for Summary Judgment was granted in part, and denied in part, removing the State Patrol as a Defendant, but allowing the claims against Officers Devenpeck and Haner to proceed, holding that it was clearly established that tape-recording police officers in the public performance of their duties was not criminalized by the Washington Privacy Act. App. 39a.

At trial on January 2-5, 2001, Senior District Judge Robert J. Bryan instructed the jury that the law was clearly established at the time of the incident that Mr. Alford had committed no crime. Despite this, the jury found for the Defendants. App. 27a. A Motion for Judgment as a Matter of Law, or in the alternative, For a New Trial was denied. App. 8a.

The Ninth Circuit Court of Appeals reversed this decision, holding that no reasonable officer could have believed tape-recording the police during public performance

of official duties constituted a "private conversation." App. 15a. A Petition for Rehearing En Banc was denied. App. 32a.

SUMMARY OF THE ARGUMENT

The underlying action was based on the simple premise that public officials in the public performance of their official duties are not protected by the Privacy Act. Since this issue was specifically addressed by the Washington Court of Appeals almost a decade ago, the law was clearly established at the time of this arrest. Additionally, given the state of the law, and the admissions of the Officers at trial, no reasonable officer could have believed that Mr. Alford was violating the law by this public taping.

The Court of Appeals correctly struck a balance between the rights of the public and the practicalities of policing, allowing qualified immunity only where the same conduct for which the person was arrested furnished probable cause to arrest. By doing so, the Ninth Circuit adeptly avoided injecting an impermissible element of subjectivity into the qualified immunity analysis. This was in keeping with the holdings of this Court, as well as a majority of the Circuit Courts of Appeals.

Additionally, a subjective misunderstanding on the part of the officers regarding qualified immunity does not make the law unclear. Rather, this Court's precedent requires that the right be clearly established, and that a standard of objective reasonableness be met.

REASONS FOR DENYING THE PETITION

The Petition should be denied for one central reason – requiring probable cause to exist for a closely related offense is the only way to maintain the standard of objective reasonableness that has served as the cornerstone of qualified immunity analysis.

1. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE DECISION BELOW APPLIES AN OBJECTIVE STANDARD FOR QUALIFIED IMMUNITY THAT BALANCES THE RIGHTS OF CITIZENS WITH PRACTICAL POLICING.

"When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

Liability under 42 U.S.C. § 1983 requires proof of two essential elements: first, the conduct complained of was committed by a person acting under the color of state law; second, that the conduct deprived the person of rights, privileges or immunities secured by the Constitution of laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). A search and seizure that violates the Fourth Amendment is actionable under 42 U.S.C. § 1983. *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992).

The Fourth Amendment provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated. . . ." U.S. Const. amend. IV. The Fourth Amendment prohibits arrests without probable cause. *See Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). Since Mr. Alford was detained, arrested, and then incarcerated there is no question but that he was seized, and the protections of the Fourth Amendment were triggered. *See Saucier v. Katz*, 533 U.S. 194 (2001); *Whren v. United States*, 517 U.S. 806 (1996).

Law enforcement may yet escape liability for an unlawful seizure if their conduct falls within the contour of the judicially-created "qualified immunity" standard. The doctrine of qualified immunity "protects governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Saucier*, *ibid.*

This Court has long rejected forays into the subjective intent of the arresting officer, instead focusing on an objective standard. *Davis v. Scherer*, 468 U.S. 183, 190 (1984) ("Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of [his] conduct as measured by reference to clearly established law.")

In the instant case, Petitioners attempt to cloak their actions with objective reasonableness based on their own subjective beliefs as to the legality of their conduct. App. 13a. Additionally, they attempt to mis-cast the prevailing standard of the Ninth Circuit Court of Appeals as a subjective one, when it is clear that the test iterated actually *avoids* a subjective inquiry. Pet. at 15; App. 13a.

As a preliminary, there is no requirement that an officer be given qualified immunity if probable cause does not exist for the crime charged. However, Courts have adopted the "related offense" doctrine to afford immunity when the officer has mislabeled or mischaracterized the unlawfulness of objectively unlawful conduct.

This is doctrinally consistent with this Court's approach to qualified immunity dating back to *Harlow*. Prior to that, qualified immunity was synonymous with "good faith" immunity, and carried both an objective and a subjective component. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975). After observing that this subjective element too-frequently precluded an early decision on qualified immunity, the Court abandoned it, adopting the now-familiar formulation that immunity lies "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

The related offense doctrine is "consistent with the teachings" above, as it precludes allowing an officer to argue about his intentions, or reasons, regarding charging. *Sheehy v. Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999). An officer's "erroneous legal description of the basis for an arrest should not expose the officer to liability if another officer would have concluded that there was probable cause to arrest for a related offense on the basis of the same conduct." *Id.* Limiting the inquiry to the "same conduct" as that which formed the basis for the actual arrest allows the officer to "choose which crime she will charge without having to charge every single offense sustainable on the facts," *Biddle v. Martin*, 992 F.2d 673, 677 (7th Cir. 1993), but prevents the officer from later offering "ex post facto

extrapolations of all crimes that might have been charged. . . ." *Richardson v. Bonds*, 860 F.2d 1427, 1431 (7th Cir. 1988). Such a broadening would "open the door" to endless explanations, rationalizations, and justifications. *Sheehy*, 191 F.3d at 21.

As the Fifth Circuit has pointed out, this inquiry does *not* depend upon a subjective component. By requiring a nexus between the charged offense and the later justification, the Court noted that the "related" requirement "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-serving statements and speculation." *Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982). Thus, the relevant inquiry is: Could the conduct that served as the basis of the arrest provide probable cause for another charge to a reasonable officer in the same situation? *Id.*

Cases applying this doctrine show its eminent practicality. In *Sheehy v. Plymouth*, 191 F.3d 15 (1st Cir. 1999), the Court addressed an arrest made after a fight between neighbors. *Id.* at 17-18. The officer initially stated that Mr. Sheehy was under arrest for failing to give him name; by the time they reached the precinct, the charge of disorderly conduct and assault with a dangerous weapon. *Id.* at 18. These charges were dismissed. *Id.*

The District Court applied the related offense doctrine, and granted qualified immunity to the officer. *Id.* The Circuit Court agreed that the related crimes doctrine should be the standard, but noted that "the crime with which the arrestee is charged and the crime offered to the court as a justification for the arrest must relate to the same conduct." 191 F.3d at 19-20. Additionally, the two crimes must be "directed generally at prohibiting the same type of conduct." *Id.* The

Court then found that "Sheehy's interaction with Officer Quinn was the sole basis for the arrest," and that Quinn "relied at the police station on prior conduct of Sheehy that unmistakably did not serve as the basis for the challenged arrest." *Id.* at 20-21.

In the Seventh Circuit, probable cause must exist on a "closely-related charge," that is, one that arises from "the same set of facts" that gave rise to the arrest. *United States v. Reed*, 349 F.3d 457, 462-63 (7th Cir. 2003). The Sixth Circuit has adopted this same position in allowing qualified immunity in a case where there was probable cause for a "related offense" that arose from the same conduct. *Avery v. King*, 110 F.3d 12 (6th Cir. 1997).

In the Eighth Circuit, "Where a defendant is arrested for the wrong offense, the arrest is still valid if probable cause existed to arrest the defendant for a closely related offense." *United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986). Even in the Fifth Circuit, the "related offense" must arise from the same conduct as the charged offense. *See Vance v. Nunnery*, 137 F.3d 270 (5th Cir. 1998). These formulations are identical to that adopted by the Ninth Circuit in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003).

Additionally, while Petitioners cite to *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003) (*Bingham II*), as evidence that the Ninth Circuit itself is in conflict, both that case, and subsequent cases within the Circuit, show that the "closely-related offense" doctrine is being applied without problems. *See, e.g., Beier v. Lewiston*, 354 F.3d 1058, 1065-66 (9th Cir. 2004) (denying qualified immunity to officers who improperly applied terms of a domestic violence order).

Applying this Court's precedents, and closely adhering to the policies underlying the doctrine of qualified immunity, the lower court correctly declined to rewrite the doctrine of qualified immunity to allow either an inquiry into the officers' subjective intentions, or an ex-post-facto search for justification for an arrest. Thus, there is no need for this Court to grant review to perform the type of "subjective inquiry" that it has rejected in so many cases. As the Ninth Circuit stated in *Beirs*, "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." 354 F.3d at 1071. Based on this, the Court should decline review, or summarily affirm the decision below, as fully in keeping with the standards and principles of this Court's Fourth Amendment jurisprudence.

2. REVIEW IS NOT MERITED DUE TO THE SPECULATIVE POSSIBILITY THAT THE OFFICERS HELD AN ERRONEOUS, SUBJECTIVE BELIEF AS TO QUALIFIED IMMUNITY.

Further, Petitioners improperly conflate the issues of "clearly established right" and qualified immunity. Petitioners' contention may be summarized as follows: If the officers had the subjective belief that they could later justify the arrest based on unrelated conduct, the law was not "clearly established," and qualified immunity lies. Pet. at 21-27. This logic is flawed from inception.

If the contours of the *right* being protected were sufficiently clear, the burden shifts to the officer to show

objective reasonableness. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Here, the officers attempt to argue that if the contours of their *immunity* are not clear, they cannot be held liable. This finds support nowhere in the law. *See generally Hope v. Pelzer*, 536 U.S. 730 (2002) (reiterating standard).

This Court has always recognized that the clearly established law requirement is a component of the qualified immunity analysis, not vice versa. In fact, this Court has observed, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *see also Saucier*, 533 U.S. at 201. If the court finds that the right was clearly established, the inquiry turns to whether a reasonable officer would have known his conduct violated that right. If this follows, qualified immunity lies. *See generally See Saucier v. Katz*, 533 U.S. 194 (2001).

The analysis adopted by this Court makes it clear that even if the contours of what is essentially an affirmative defense are subject to argument, that does not impact the unlawfulness of the conduct, but merely the ability to find civil liability. If the right was clearly established, the right was violated, and if the conduct does not meet the standard of objective reasonableness, the analysis ends.

Indeed, to adopt the Petitioners' argument would be to inject an impermissible subjective element into the analysis. Once again, Petitioners attempt to put the focus on what they may, or may not, have subjectively believed at the time of the arrest. This does not even approach the objective standard of reasonableness required of them, and certainly does not merit review by this Court.

CONCLUSION

In summary, the Ninth Circuit's decision fully comports with the precedent, and aims, of the qualified immunity doctrine. Any further expansion of the "closely related offense" doctrine would open a Pandora's box of subjectivism and rationalization that would have the potential to eviscerate the protections of the Fourth Amendment. For all the reasons discussed above, the Petition for Certiorari should be denied.

Respectfully submitted,

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(3)

NO. 03-710

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IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

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v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Does Not Dispute The Existence Of A Conflict On An Important Issue Of Fourth Amendment Law

In the petition we explained that there is a significant conflict among the circuits on an important issue of Fourth Amendment law. Pet. 9-12. The Eleventh and D.C. circuits hold that if probable cause does not support an arrest for the offense cited by the arresting officer, the arrest is valid if the officer had probable cause to arrest for another offense. The Fifth, Sixth, Seventh, Eighth, and Ninth Circuits hold that the arrest is only valid if the two offenses are closely related. The Ninth Circuit's decision in this case also conflicts with decisions of the Washington and California Supreme Courts. Pet. 17-18. Amicus Curiae Brief of the State of California, ex rel., Bill Lockyer, Attorney General, in support of Petitioner.

Respondent Alford does not deny that there is a conflict. He simply argues that the closely related offense doctrine is correct. Br. Opp'n 1 ("This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity."). Alford's belief that the Ninth Circuit's decision in this case is correct is irrelevant. There is a significant conflict among the circuits (and with Washington and California) that should be resolved by this Court.

This conflict involves an important issue of Fourth Amendment law that can arise in two contexts. The first is the situation – like this case –

where a plaintiff is seeking damages for false arrest in a civil rights action. The second occurs when a criminal defendant seeks to suppress evidence on the grounds that it is the fruit of an improper arrest. *See, e.g., United States v. Bookhardt*, 277 F.3d 558 (D.C. Cir. 2002). This issue also has significant implications for the criminal justice system. As we explained in the petition, the closely related offense doctrine will lead to stacking charges and improperly usurps the prosecutorial function. Pet. 18-21. Alford does not contest these points or the significance of the issue.

2. The Brief In Opposition Misconstrued The Fourth Amendment's "Objective Reasonableness" Test And Advocates An Interpretation Which Is Inconsistent With The Decisions Of This Court

Alford (Br. Opp'n 6-7) and the majority opinion below (Pet. 12(a) n.2) erroneously contend that by looking to whether probable cause exists for unrelated crimes a court would necessarily have to inquire into the subjective beliefs or motivations of the officer which would "eviscerate the objective reasonableness standard" that is applicable under both the Fourth Amendment and qualified immunity analysis. This interpretation of objective reasonableness turns the test on its head. It is in fact, the closely related offense doctrine that injects an "impermissible element of subjectivity" into the objective reasonable test. The closely related offense doctrine keys on the stated, subjective reason given by an officer for the existence of probable cause, rather than properly focusing on the totality of facts and circumstances known to the officer at the time of arrest. *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996); *Scott v. United States*, 436 U.S. 128 (1978).

This case is a perfect example. The officers had probable cause – based on the facts and circumstances known at the time – to arrest Alford for impersonating an officer and obstructing a public servant. The officers also thought that the facts and circumstances provided probable cause to support an arrest for violation of the Privacy Act. The officers discussed these charges with a deputy prosecuting attorney who agreed they had probable cause to arrest. Pet. 18a, 42a-43a. The fact that the offenses of impersonating an officer or obstructing a public servant are not closely related to a violation of the Privacy Act is irrelevant. The objective facts and circumstances known to the officers at the time of arrest provided probable cause to arrest for those two offenses. The officers' incorrect subjective belief that there was a violation of the Privacy Act does **not** eliminate probable cause to arrest for the other two offenses.

3. The Brief In Opposition Misconstrues The Qualified Immunity Issue Presented By Petitioners

Alford addresses the wrong qualified immunity issue, focusing on probable cause to arrest for the Privacy Act violation. Br. Opp'n 10-11. The issue is whether it was clearly established that probable cause could be found to exist only for closely related offenses.

The issue of what was clearly established changed between the time of trial and appeal. Prior to trial, the district court judge held that lack of probable cause to arrest for a violation of the Privacy Act was clearly established. The judge, however,

sent the issue of qualified immunity to the jury on the question of whether Defendants could have reasonably believed they had probable cause to arrest for that crime. Pet. 61a-62a.

The issue of probable cause was not limited to the Privacy Act. At trial the jury heard testimony and argument, without objection, that probable cause existed for the crimes of impersonating and obstructing a public servant. Pet. 42a-43a. Under the unchallenged instructions, the jury was authorized to find the existence of probable cause for any crime as a defense. Pet. 45a-58a.

On appeal, Alford did not belatedly raise the closely related offense doctrine. Instead, the Court of Appeals raised that issue on its own, a few weeks before oral argument. Pet. 24a. The majority opinion then held that the effect of the closely related offense doctrine was to preclude consideration of probable cause that the jury inherently found for the crimes of impersonating and obstructing. The Ninth Circuit then went one step further in deciding the qualified immunity issue, and ruled that the applicability of the closely related offense doctrine was clearly established.[1]

The Court does not need to reach the qualified immunity issue if it agrees with Petitioner's first argument that the closely related offense doctrine is contrary to the Fourth Amendment's objective

[1] The majority reached this conclusion even though that decision was contrary to state law, *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash. 2d 1007 (1992), and the fact that the Ninth Circuit's prior discussion of the closely related offense doctrine in *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho*, 515 U.S. 1144 (1995), was dicta in a footnote.

reasonableness test. Should the Court address this issue, the law cannot be said to be clearly established when there is a split in the federal circuit courts and state court case law has determined that it is constitutionally permissible to consider the existence of probable cause for any crime in upholding an arrest. In such case, the public officials are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001); *Hunter v. Bryant*, 502 U.S. 224 (1991).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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March 18, 2004

No. 03-710

COPY

FILED
FEB 6 - 2004

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense which the officer subjectively believed to be the basis for the arrest?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-710

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

INTEREST OF AMICUS CURIAE

California urges this Court to grant certiorari and reverse the Ninth Circuit Court of Appeals decision in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003). In *Alford*, the Ninth Circuit permitted an arrestee to bring suit against Washington police officers for arresting him on the basis of their mistaken belief that he had violated a law prohibiting the tape recording of private conversations, despite the existence of probable cause to believe that the arrestee had committed another, unrelated offense. In contrast, California law properly interprets the decisions of this Court to render immaterial the actual, articulated motivations or beliefs of the arresting officer, so long as probable cause otherwise exists to arrest a suspect, even for an unrelated offense. California's interest in the protection of its citizens and the prosecution of crime suffers a chilling effect under the Ninth Circuit's erroneous ruling in *Alford*. Accordingly, California has a solemn duty to seek its correction.

SUMMARY OF ARGUMENT

In *Alford*, the Ninth Circuit permitted the mistaken, subjective beliefs of the arresting officer to invalidate an arrest, despite the existence of probable cause to believe the suspect had committed another offense. In denying the officers' claim of qualified immunity, the court set out what it referred to as "the test applied in the Ninth Circuit": "probable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976. Under this doctrine, if both offenses are not closely related, the officer's mistaken belief–even if made in good faith and supported by the judgment of a deputy prosecutor, as here–will expose him to civil suit under 42 U.S.C. § 1983.

The Ninth Circuit is wrong. No decision of this Court has ever held that arresting a person for the wrong offense is lawful only where probable cause exists for a "closely related" offense. Indeed, such a doctrine is plainly contrary to the recent decisions of this Court, which have steadfastly refused to consider the actual motivations or beliefs of the arresting officer. No degree of relation at all is required between the offense that motivates the officer to arrest and the offense for which probable cause actually exists.

California cases have properly interpreted the decisions of this Court to disavow any inquiry into the actual, subjective beliefs of the arresting officer. Under the Ninth Circuit's ruling in *Alford*, however, California peace officers face civil liability for properly following this Court's decisions and the decisions of our state courts. California therefore asks this Court to grant the writ in order to extinguish the "closely related offense" doctrine and reverse the Ninth Circuit's finding of liability against the Washington police officers who properly arrested Alford.

REASONS FOR GRANTING THE PETITION

In *Alford*, the Ninth Circuit permitted the mistaken, subjective beliefs of the arresting officer to invalidate an arrest, despite the existence of probable cause to believe the suspect had committed another offense. The Ninth Circuit based its conclusion on the following "closely related offense" doctrine: "probable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976. However, this doctrine is not found in any decision of this Court and plainly ignores this Court's recent decisions, which have refused to consider the actual motivations or beliefs of the arresting officer. No degree of relation is required between the offense that motivates the officer to arrest and the offense for which probable cause actually exists.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON AN IMPORTANT ISSUE INVOLVING THE PROPER STANDARD FOR A LAWFUL ARREST

The Ninth Circuit decision below squarely conflicts with this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, vice-squad officers patrolling a "high drug area" stopped a car after witnessing suspicious behavior by its occupants. *Id.* at 808. When an officer approached the car, he saw two large plastic bags of crack cocaine in the hands of Whren, the passenger. *Id.* at 808-809. At trial, Whren challenged the legality of the stop under the Fourth Amendment. *Id.* at 809-810. Whren claimed that, even though the officers had probable cause to stop the car for traffic violations, those reasons were a pretext for the actual, subjective motivation behind the stop–the investigation of drug activity–for which the

officers lacked probable cause. *Id.* at 810. Whren asked this Court to consider the actual motivation behind the traffic stop and invalidate it when the articulated motivation could be shown to be a pretext. *Id.* at 808, 811.

In a unanimous decision, this Court rejected Whren's argument, explaining that an officer's actual motive cannot invalidate objectively justifiable behavior. *Whren*, 517 U.S. at 812. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. So long as the officer's action is supported by objective circumstances, the officer's "state of mind" is irrelevant.[1] *Id.* Stated another way, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Accordingly, the stop at issue was validated by the presence of probable cause to support the traffic violations, regardless of the actual motivations of the officers. *Id.* at 819.

Five years later, in *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001), this Court forcefully reiterated *Whren*'s holding. In a per curiam opinion, this Court reversed an Arkansas Supreme Court's invalidation of an arrest on the basis of an officer's "improper subjective motivation." *Id.* at 772. Again, this Court disapproved any consideration of the arresting officer's "actual motivations" within Fourth Amendment analysis. "The Arkansas Supreme Court's holding . . . cannot

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1. The *Whren* decision did note that inventory searches and administrative inspections fall outside this rule because both are conducted in the absence of probable cause. *Whren*, 517 U.S. at 811-12. The decision also noted that the selective enforcement of law on the basis of race, for example, would be an exception to this rule, though such a claim would be brought under the Equal Protection Clause, not the Fourth Amendment. *Id.* at 813. Neither exception applies to the instant case.

be squared with our decision in *Whren*, in which we noted our 'unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,' and held unanimously that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" *Id.* at 771-772. Moreover, the *Sullivan* decision clarified that it "is of no particular moment" that "*Whren* involved a traffic stop, rather than a custodial arrest." *Id.* at 772. Thus, *Whren*'s rule applies equally to arrests.

In the decision below, however, the Ninth Circuit ignored the dictates of *Whren* and *Sullivan*. The Ninth Circuit invalidated the arrest of Alford on the basis of Sergeant Devenpeck's erroneous belief that Alford had violated a state law prohibiting the taping of private conversations, despite the clear existence of probable cause that Alford had violated a state law prohibiting the impersonation of a police officer.[2] In the Ninth Circuit's view, the subjective belief of the arresting officer can void the lawfulness of an arrest despite the objective

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2. Washington law provides, in pertinent part:

> A person is guilty of criminal impersonation in the second degree if the person:
> (a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and
> (b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person would believe the person is a law enforcement officer.

Wash. Rev. Code § 9A.60.040.

presence of probable cause. This is plainly contrary to *Whren* and *Sullivan*.

Indeed, the Ninth Circuit's definition of probable cause reveals the symptom of its misunderstanding. *Alford* incorrectly defines probable cause as follows: "Probable cause exists when an officer has a reasonable belief that a crime has been, is being, or is about to be committed." *Alford*, 333 F.3d at 976. This definition is incorrect because it creates an erroneous subjective component by requiring an arresting officer to actually possess a "belief" concerning the existence of certain facts. Though the qualifier "reasonable" makes clear that *Alford* sets out an objective requirement as well, that component is in addition to the erroneously imposed subjective standard.

The infirmity of the Ninth Circuit's definition appears less subtle when one considers a proper definition of probable cause, as set out by this Court: "the objective inquiry [is] whether a reasonable officer *could have believed*" that a crime had occurred. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) [italics added]. The use of the phrase "could have believed" correctly avoids reference to the arresting officer's actual state of mind and instead focuses on the objective presence of facts, be they known or unknown, or their legal significance understood or misunderstood. The vantage point is a hypothetical officer: "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 124 S.Ct. 795, 800 (2003); *accord Thompson v. Keohane*, 516 U.S. 99, 112 (1995) ["the court must apply an objective test"]. Whether the arresting officer actually holds a certain view of those facts is immaterial.

Rather than simply asking whether the objective facts of the case supported probable cause, the *Alford* Court further erred by applying its version of the "closely related offense" doctrine to the facts of the case, stating that "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976 [italics in original]. Noting that an impersonation charge would have been based on conduct unrelated to the mistaken tape recording charge, the Court found that the "closely related offense" standard was not met here. *Id.*

The Ninth Circuit is again mistaken. The Ninth Circuit's "closely related offense" doctrine finds no basis in any of this Court's decisions and nowhere appears in any controlling authority from this Court. In *Alford*, the Ninth Circuit refers to it as "the test applied in the Ninth Circuit" and cites its own prior decision in support of the doctrine. *Alford*, 333 F.3d at 976, *citing Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994). However, *Gasho*, like other circuit court decisions citing the "closely related offense" doctrine, cannot trace it to any decision by this Court. Indeed, whatever the basis for the doctrine, that basis cannot be reconciled with *Whren* or *Sullivan*. The arrest in *Whren* was valid despite the fact that the traffic violations, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Likewise, the vehicle code violations in *Sullivan*, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Yet the arrest in *Sullivan* was also proper under the Fourth Amendment. In neither decision did the lack of a close relation between the offenses render the arrest invalid. Accordingly, the lack of a close relation between the supposed tape recording offense and the impersonation offense should not invalidate the instant arrest. The present case affords this Court the opportunity to extinguish this faulty doctrine.

II.

THE NINTH CIRCUIT'S DECISION ALSO CONFLICTS WITH CALIFORNIA LAW, AND THEREBY EXPOSES CALIFORNIA PEACE OFFICERS TO CIVIL LIABILITY DESPITE CALIFORNIA'S PROPER CONFORMITY TO THE LEGAL PRECEDENT OF THIS COURT

The *Alford* decision also conflicts with California law. California law properly recognizes that the *Whren* decision both eliminated any consideration of the arresting officer's actual beliefs as to probable cause and also vanquished any requirement of a close relationship between the offense supported by probable cause and the offense lacking in probable cause.

In *People v. Rodriguez*, 53 Cal.App.4th 1250, 1262 (1997), a California appellate court considered a case in which there was no probable cause to arrest a defendant for one murder, but there was probable cause to arrest him for a second murder. The court held that so long as probable cause supported the defendant's arrest for the second murder, it was immaterial that the officer may have arrested the defendant on the basis of his mistaken belief that probable cause existed for the first murder. *Id.* In reaching its conclusion, the *Rodriguez* court found that *Whren* had foreclosed any consideration of the subjective intent of the arresting officer:

> As noted by the *Whren* court, the test is not whether a reasonable officer would have made the arrest for the reasons given. . . . [W]hether [the officer] believed he was arresting defendant only on the [first murder] or on both [murders], the arrest was valid because it was supported by probable cause to believe defendant had committed *a* homicide.

Id. at 1266. The officer's belief, noted the court, is not part of the test for probable cause. *Id.* Significantly, the *Rodriguez* court also found it "irrelevant" whether the two murders were related. *Id.* at 1267.

Since *Rodriguez*, other California cases have properly held that, so long as probable cause exists to support an arrest for some crime, the arresting officer's mistaken belief as to the presence of probable cause for a certain crime is immaterial. *See In re Justin K.*, 98 Cal.App.4th 695, 699 (2002) [the officer's subjective understanding of the law does not invalidate a detention so long as the officer's conduct is objectively reasonable]; *People v. White*, 107 Cal.App.4th 636, 641 (2003) [same]. These cases properly conform to the decisions of this Court.

However, the conflict between California and the Ninth Circuit on this issue of Fourth Amendment law exposes California peace officers to the potential of civil liability for properly following this Court's precedent. The facts of *Alford* aptly demonstrate this danger. There, as the dissent points out, Washington state patrol officers were clearly doing their job to protect the public. *Alford*, 333 F.3d at 979. The officers properly investigated Alford after he had activated his wig-wag lights at a stranded car at night in "dark and deserted" area. *Id.* at 974-975. The occupants of the stranded car believed Alford to be a police officer. *Id.* at 974. After contacting Alford, officers found him to be in possession of handcuffs, a microphone, a radio that was broadcasting the communications of the local Sheriff's office, a police scanner and tape recording equipment. *Id.* at 975. Alford's possession of these items was "ominous," to say the least, as the dissenting opinion noted. *Id.* at 979. It cannot be doubted that probable cause existed to arrest Alford for impersonating a police officer. By arresting Alford, the officers were doing their job to protect the public. Clearly, the jury agreed because it found in favor of the officers

after Alford sued, notwithstanding a jury instruction explaining that clearly established state law did not bar the type of recording for which Alford was arrested. *Id.* at 974, 979.

It is troubling that the Ninth Circuit would disregard the jury's verdict, in addition to the exercise of the district court judge's discretion, by reversing the denial of Alford's motion for a new trial. *Alford*, 333 F.3d at 974. The Ninth Circuit's advancement of such a lawsuit, especially when there was no suggestion of bad faith or improper motives on the part of the officers, has disturbing implications for California peace officers as well.

The Washington state patrol officers in this case were doing their job to protect the public. The Ninth Circuit's decision in *Alford* frustrates that effort. The *Alford* decision contravenes the precedent of this Court and conflicts with California decisions that properly follow that precedent. This Court should grant the writ and reverse the decision of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court grant the petition for certiorari filed by the State of Washington.

Dated: February 6, 2004

Respectfully submitted,

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No. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS F OR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER , ATTORNEY GENERAL, IN SUPPORT OF P ETITIONER

CERTIFICATE OF SERVICE

I, Patrick J. Whalen, a member of the Bar of this Court, hereby certify that on this 6th day of February 6, 2004, a copy of Amicus Curiae Brief Of The State Of California Ex Rel. Bill Lockyer, Attorney General, In Support Of Petitioner, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

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All persons required to be served have been so served.

Dated: February 6, 2004

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Supreme Court, U.S.
FILED
JUN 17 2004
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No. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

V.

JEROME ANTHONY ALFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOV. 6, 2004
CERTIORARI GRANTED APRIL 19, 2004

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RELEVANT DOCKET ENTRIES

November 12, 1999 [1] Complaint for False Arrest, Violation of Civil Rights; Jury Demand filed in the U.S. District Court, Western District of Washington.

May 23, 2000 [24] Defendants' Answer to Complaint filed in the U.S. District Court, Western District of Washington.

June 16, 2000 [27] Amended Complaint by plaintiff; adding Christine Gregoire, Annette Sandberg, and John Does, and Jury Demand, filed in the U.S. District Court, Western District of Washington.

October 5, 2000 [35] Motion by Defendants Washington State Police, Joi and John Doe Haner and Gerald and Jane Doe Devenpeck for Summary Judgment, filed in the U.S. District Court, Western District of Washington.

October 5, 2000 [36] Memorandum by defendants Washington State Patrol, Joi and John Doe Haner and Gerald and Jane Doe Devenpeck in Support of Motion for Summary Judgment, filed in the U.S. District Court, Western District of Washington.

November 14, 2000 [39] Response/Opposition by plaintiff to defendants' motion for summary judgment, filed in the U.S. District Court, Western District of Washington.

November 30, 2000 [41] Order by Judge Robert J. Bryan GRANTING in part and denying in part defendants' motion for summary judgment; claims against Washington Sate Patrol, Christine Gregoire and Annette Sandberg are dismissed with prejudice; claims against Officers Joi Hander and Gerald Devenpeck in their official capacities are dismissed with prejudice; claims against Officers Joi Hander and Gerald Devenpeck in their individual or personal capacities on basis of qualified immunity is denied without prejudice, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [50] Trial Brief submitted by defendants, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [51] Proposed Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [52] Pre-Trial Order approved by Judge Robert J. Bryan, filed in the U.S. District Court, Western District of Washington.

January 2, 2001 [55] Minutes of Day One of Jury Trial: defendants object to plaintiff's witness Dr. Gail Shuler, argument, motion to reject witness is denied; plaintiff moved Court to deny defendants arguing re probable cause or to craft a limiting instruction to jury, issue to be resolved during trial; voir dire/selection; jury sworn;

opening statements; plaintiff called Jerome A. Alford, Dr. Gail Shuler; recess, filed in the U.S. District

January 3, 2001 [57] Minutes of Day Two of Jury Trial: Jerome Alford resumes stand; plaintiff calls: K. Remley; plaintiff rests; defendants reserve motions until end of day; defendants call: J. Haner; jury excused; defendants moved for dismissal – DENIED, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [59] Proposed Supplemental Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [60] Supplemental Proposed Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [61] Minutes of Day Three of Jury Trial: defendants call: P. Pierson, G. Devenpeck; jury excused, discussion as to verdict forms; defendants call: M. Lindquist; defendants rest; court instructs jury; closing arguments; jury retires do deliberate, filed in the U.S. District Court, Western District of Washington.

January 5, 2001 [66] Court's Instructions to jury, filed in the U.S. District Court, Western District of Washington.

January 5, 2001 [68] Judgment by Judge Robert J. Bryan, jury finds for defendants and

against plaintiff, filed in the U.S. District Court, Western District of Washington.

January 9, 2001 [69] Motion by plaintiff for judgment as a matter of law or in the alternative for a new trial, filed in the U.S. District Court, Western District of Washington.

January 10, 2001 [70] Order by Judge Robert J. Bryan DENYING plaintiff's motion for judgment as a matter of law or in alternative for new trial, filed in the U.S. District Court, Western District of Washington.

February 7, 2001 [72] Notice of Appeal by plaintiff from District Court decision/jury verdict finding for defendants and against plaintiff, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [76] Transcript of jury trial, Volume 1: January 2, 2001, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [77] Transcript of jury trial, Volume 2: January 3, 2001, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [78] Transcript of jury trial, Volume 3: January 4, 2001, filed in the U.S. District Court, Western District of Washington.

May 18, 2001 Certificate of Record Transmitted to United States Court of Appeals, Ninth Circuit.

May 22, 2002 Clerk's Record on Appeal transmitted to Circuit, 2 volumes, 1 expando.

August 22, 2003 [79] Judgment from United State Court of Appeals, Ninth Circuit, Reversing and Remanding, filed in the U.S. District Court, Western District of Washington.

Entered
On Docket
FEB 08 2001
By Deputy /s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED
FEB 07 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

JEROME ANTHONY ALFORD,

Plaintiff,

vs.

GERAL DEVENPECK, et al.,

Defendants

Case No.: C99-5586 RJB

NOTICE OF APPEAL

TO THE CLERK OF THE COURT

Notice is hereby given that Jerome Anthony Alford, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit the jury verdict entered in this action on the 5th day of January, 2001.

DATED this 5th day of February, 2001.

//s//

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CERTIFICATE OF SERVICE

I, R. Stuart Phillips, hereby certify that I served a copy of the attached on counsel for Defendants by first class mail this 6th day of February, 2001, at the following address:

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//s//
R. Stuart Phillips, Esq.

EC [FILED] LODGED
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DEC 22 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

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DEC 18 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

The Honorable ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD,

Plaintiff,

v.

GERALD DEVENPECK, JOI HANER,

Defendants.

NO. C99-5586 RJB

~~PROPOSED~~RJB PRETRIAL ORDER

The parties hereby submit the following proposed Pretrial Order.

I. JURISDICTION

The court's jurisdiction to hear this case alleging violation of constitutional rights derives from 28 U.S.C. §§ 1331 & 1343. The court has supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367.

II. CLAIMS AND DEFENSES

The plaintiff will pursue at trial the following claims: violation of First, Fourth, and Fourteenth Amendments, violation of 28 U.S.C. § 1983, false arrest, malicious prosecution, and false imprisonment. The defendant will pursue the following affirmative defenses: qualified immunity; good faith; probable cause; negligence of third parties; and failure to mitigate.

III. ADMITTED FACTS

The following facts are admitted by the parties:

On the evening of November 22, 1997, Tony Alford, an employee at the Puget Sound Naval Shipyard, was on his way to his second job. State Patrol Trooper Joi Haner, who had noticed the disabled vehicle and had seen plaintiff's car pull in behind the disabled vehicle, turned around and pulled in behind plaintiff's car. Plaintiff left the scene. One of the individuals in the stranded car informed Trooper Haner that the automobile that had stopped to help them had "wig wag" headlights, which are a traffic infraction under Washington law.

Trooper Haner requested backup assistance, and pursued and stopped plaintiff on SR 16. Trooper Haner noted that the license plates on plaintiff's car were unreadable due to a dark-tinted license plate cover, a small amateur radio was installed and tuned to Kitsap County Sheriff's Office communications, and that plaintiff had a police scanner next to him. Plaintiff informed Trooper Haner that he was on his way to his job as a bouncer, and had handcuffs in the car, but no weapons.

Mr. Alford was carrying a tape-recorder in his car. When stopped that night, he turned it on. When

questioned about his headlights, Mr. Alford informed the Trooper that a local dealer had just installed a new alarm system that very day, and was unsure of how it operated. He also informed the trooper that a relay was not working properly and had been placed on order. Plaintiff *was ultimately cited for the wig-wag headlights and arrested for a Privacy Act violation.* Both charges were later dismissed by the district court.

Plaintiff contends as follows:

He stopped to help a disabled vehicle on the shoulder of SR 16. As Trooper Haner got out of his car, plaintiff was returning to his car; he left the scene. Plaintiff gave the stranded motorist a flashlight to use, and then continued on his way. Mr. Alford told the trooper he was on his way to his part-time job as a bouncer at Bud's in Milton. After a short conversation with Mr. Aflord, Trooper Haner retired to his vehicle. After a ten or fifteen minute wait, Gerald Devenpeck, a State Patrol Sergeant arrived on the scene. He and Haner agreed that they had a "wannabe cop" on their hands. Both Devenpeck and Haner came to the car while Devenpeck interrogated Mr. Alford about his headlights. Mr. Alford repeatedly stated that he had only had the system installed that very day, and didn't know how to work it. He even pulled out the owner's manual in an attempt to make the lights work. He also told the officers that a relay was malfunctioning and was on back order at the dealer. When Mr. Alford complained about getting an "ass chewing" for stopping to help someone out, Devenpeck relied [sic], "I haven't started to chew your ass yet."

Without requesting permission, Devenpeck ordered Mr. Alford out of his car, and got in. At that time, Devenpeck noticed that Mr. Alford had been tape-recording his interaction with Devenpeck. He immediately placed Mr. Alford under arrest for "illegal tape recording," stating that he could not record the stop without the officer's consent. By this time, nearly an hour had elapsed since the initial contact with Haner.

Mr. Alford told the officers that he had been through this before with the Kitsap County Sheriff's Office, who had once cited him for the same thing. At that time, Mr. Alford contacted the American Civil Liberties Union who furnished him with both a copy of the applicable statute and a copy of *State v. Flora[sic],* a three-year-old Washington Court of Appeals case holding that police officers on the job are not protected by the Privacy Act. When he furnished these to the KCSO, all charges were dropped, and an apology issued.

Accordingly, Mr. Alford directed Devenpeck to the pertinent section of the RCW and the case, stating that he had a copy of both in his glove box. The officers refused to listen. Instead, at 8:10 p.m., they handcuffed him and placed him in Devenpeck's patrol car. Devenpeck then transported Mr. Alford to the Pierce County Detention Facility.

At the jail, Devenpeck charged Mr. Alford with a felony violation of RCW 9.73.030, illegally recording a private conversation without consent. Devenpeck listed himself and Haner as "victims" of the crime. Mr. Alford's car was towed and impounded, and he was forced to spend the night in

jail with the general population. He was fired from his job as a bouncer due to the arrest. He has now been diagnosed with an adjustment disorder and has been receiving treatment from a psychiatrist.

Defendants now admit that they did not contact an attorney prior to arresting Mr. Alford.

Defendants contend as follows:

Trooper Haner observed Plaintiff's vehicle pull in behind a disabled vehicle on the opposite side of SR 16. Trooper Haner made a U-turn at his first opportunity and pulled in behind Plaintiff's vehicle. Plaintiff was hurriedly proceeding back to his car as Trooper Haner exited his Patrol vehicle. After learning that the individuals at the disabled car had believed Mr. Alford to be a police officer and that Plaintiff had wig-wag headlights on his vehicle, Trooper Haner departed to question Plaintiff. Trooper Haner called for assistance.

When Trooper Haner caught up to Plaintiff he activated his emergency lights and they both pulled to the side of the road. Trooper Haner noticed Trooper Haner noticed [sic] several unusual aspects about Plaintiff's car: the license plates were unreadable due to a dark tinted license plat cover, a small amateur radio was installed with microphone attached, with which Plaintiff was monitoring Kitsap County Sheriff's Office communications; Plaintiff had a portable police scanner on the seat next to him; and although Plaintiff stated he did not have a gun in the vehicle, he did state he had handcuffs. Plaintiff stated that he used to be a trooper in Texas and a Puget Sound Naval Shipyard police officer in the 1980's but was now a bouncer at a nearby tavern.

Trooper Haner further inquired of Plaintiff about the wig-wag headlights that were reported to him by the occupants of the disabled vehicle. Plaintiff responded that the lights were part of an alarm system and that he uses them for safety along with his emergency flashers every time he pulls over. However, when Trooper Haner asked Plaintiff to demonstrate how they work, Plaintiff was unable to activate the wig-wag lights using the methods he tried at that point.

Shortly after Trooper Haner stopped the Plaintiff, Sergeant Gerald Devenpeck arrived to assist Trooper Haner. Sergeant Devenpeck consulted briefly with the Trooper, then approached Plaintiff's vehicle. Sergeant Devenpeck inquired as to the operation of the wig-wag headlights and Plaintiff again explained that they were part of his vehicle alarm system. Sergeant Devenpeck asked Plaintiff to demonstrate how the lights work but Plaintiff claimed he was unable to do so.

Sergeant Devenpeck asked Plaintiff to release the hood so they could look for a flasher device but they did not find one. When Plaintiff returned to his vehicle, Sergeant Devenpeck noticed a shiny black object on the seat next to the driver's seat. Sergeant Devenpeck looked closely at the device and noticed that it was a tape recorder with the play and record button depressed and apparently operating. When he rewound the tape, Sergeant Devenpeck could hear both his voice and Plaintiff's voice had been recorded. Sergeant Devenpeck had been trained on and was aware of the Privacy Act, RCW 9.73.030, and had some experience with it. He had Trooper Haner place Plaintiff under arrest for violating that statute.

Sergeant Devenpeck then called Mark Lindquist, the on-call Deputy Prosecuting Attorney and was advised that an arrest would be appropriate. Based on the advice given him by that DPA, Sergeant Devenpeck arrested Plaintiff for a violation of RCW 9.73.030 and cited Plaintiff for the wig-wag headlights that are in violation of RCW 46.37.280. Upon inventorying Plaintiff's vehicle before impound, Sergeant Devenpeck located a silver metal switch on the bottom side of the steering column of Plaintiff's vehicle that operated the wig-wag headlights.

IV. ISSUES OF LAW

1. Did Defendants violate Plaintiff's rights under the Fourth and Fourteenth Amendments when they arrested him?

2. Did Defendants violate Plaintiff's rights under the Fourth and Fourteenth Amendments when they detained him by the roadside for an hour to investigate a traffic infraction?

3. Do the actions and statements of Defendants evidence malice or willfulness so as to justify punitive damages?

4. Did the arrest and imprisonment of Plaintiff for actions that were not a crime constitute false arrest and false imprisonment under Washington law?

5. Did Defendants reasonably believe that Plaintiff was committing a ~~felony~~ gross misdemeanor[RJB] by recording his own traffic stop?

V. EXPERT WITNESSES

a. The name(s) and addresses of the expert witness(es) to be used by each party at the trial and the issue upon which each will testify is:

(1) On behalf of plaintiff: No expert witnesses were disclosed.

(2) On behalf of defendant: No expert witnesses were disclosed.

Over objection of Defendants, Plaintiff will offer the testimony of Katherine Nelson, CPA, Doran Anderson Nelson, 19307 Eighth Avenue NE, Suite C, Poulsbo, Washington. If allowed, she will testify to economic damages valuation.

VI. OTHER WITNESSES

1. Jerome Anthony Alford, Plaintiff, Bremerton, Washington, will testify as to all events and damages.

Over objection of Defendants, Plaintiff will offer testimony from the following witnesses:

1. Dr. Gail Shuler, Group Health Cooperative Behavioral Science Clinic, Bremerton, Washington, will testify as a treating physician concerning the impact of the incident on Plaintiff's mental condition and damage to Plaintiff.

2. Jacob Alford, Bremerton, Washington, will testify as to personal observations of impact of incident on Plaintiff.

3. Kristen Remley, Bremerton, Washington, will testify as to personal observations of impact of incident on Plaintiff.

4. Mr. John Alford, Bremerton, Washington, will testify as to bailing out son from Pierce County Jail. POSSIBLE WITNESS.

5. Mrs. Helen Alford, Bremerton, Washington, will testify as to bailing out son from Pierce County Jail. POSSIBLE WITNESS.

6. Mrs. Francine Kaplan, Silverdate, Washington, will testify as to bailing out brother from Pierce County Jail.

7. Mr. Dale Davis, Port Orchard, Washington, will testify as to work relations and job performance after incident. POSSIBLE WITNESS.

8. Trooper Andrew Cozzolino, Gig Harbor, Washington, will testify as to Gerald Devepeck's abuse of power. POSSIBLE WITNESS.

(b) On behalf of defendant:

1. Gerald Devenpeck. Defendant, contact through counsel. Will testify regarding his training and duties as a Trooper Sergeant with the Washington State Patrol and regarding his arrest and investigation of Plaintiff. WILL TESTIFY.

2. Joi Haner. Defendant, contact through counsel. Will testify regarding his training and duties as a Trooper with the Washington State Patrol and regarding his arrest and investigation of Plaintiff. WILL TESTIFY.

Over objection of Plaintiff, Defendants will offer the following witnesses:

3. Mark Lindquist. Pierce County Deputy Prosecuting Attorney. Will testify as to contact with Troopers at time of Plaintiff's arrest. WILL TESTIFY.

4. Pam Pierson, Bud's in Milton, 2702 Milton Way, Milton, Washington 98354. Will testify as to Plaintiff's employment and termination therefrom. WILL TESTIFY.

5. Art Lazel, Puget Sound Naval Shipyard. Will testify as to his supervision of Plaintiff and address Plaintiff's damage claims on charges to his employment and pay rates. POSSIBLE WITNESS.

VII. EXHIBITS

(a) Admissibility stipulated.

Plaintiff's Exhibits

1. Tape Recording of traffic stop.

2. Traffic Infraction Ticket, 0711605, 11/22/97.

3. Dismissal of Traffic Infraction Ticket and Citation, Pierce County District Court.

4. Report of Investigation, Joi Haner.

5. Report of Investigation, Gerald Devenpeck.

6. Mental Health Records, Jerome Alford.*

7. Washington State Patrol Property/ Evidence Report, Case 97-0131104-01.

8. Washington State Patrol CADLOG and Text Report, Case 97-013104.

9. Authorization to Tow / Impound, 11/22/97.

*Defendants object to the admissibility and authenticity of mental health records that reference the incident that is the subject of Plaintiff's Complaint.

Defendant's Exhibits:

A-1 Plaintiff's employment records.

(b) Authenticity stipulated, admissibility disputed:

Plaintiff's Exhibits:

1. Transcript of Plaintiff's tape recording of traffic stop.

2. Personnel File, Gerald Devenpeck.

3. Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Responses Thereto, 8/4/00.

4. 2000 WSP Regulation Manual (excerpts).

5. Washington State Patrol payroll & personnel records, Gerald Devenpeck, 1980-1999.

6. Field Intelligence Report, Trooper Haner, 11/22/97.

7. Declaration of Joseph Olson, 7/17/00.

8. Notice from Chief Annette Sandberg, 7/17/00.

9. Declaration of Joi Haner, 7/17/00.

10. Declaration of Gerald Devenpeck, 6/26/00.

11. Requests for Admission and Answers thereto.

12. Disciplinary File, Gerald Devenpeck.

Defendant's Exhibits:

A-2 Criminal History Records of Plaintiff Regarding Theft 3, Offense Date: 12-23-82.

(c) Authenticity and admissibility disputed:

Plaintiff's Exhibits

1. Appointment as Special Officer by Bremerton City Police Chief, 12/2/81.

2. Thrift Savings Plan Loan Application TSP-20.

3. Mental Health Report on Jerome Alford, authored by Dr. Gail Shuler, 9/13/00.

4. Sandra Baker & Associates, bill for transcription of tape recording, 11/6/00.

5. Federal Express bill, 11/24/00.

6. Transcript, Olympic College.

7. Goodwin Attorney Services, Inc. bill, 10/16/00.

8. Goodwin Attorney Services, Inc. bill, 10/11/00.

9. Transcript, University of Puget Sound, Jerome A. Alford.

10. Transcript, Central Washington University, Jerome A. Alford.

11. Department of Defense Personnel Management Service Federal Wage System and Special Production Facilitating Wage Rate Schedules for the Seattle-Everett-Tacoma, Washington Wage Area, AC-0143R, dated 12/22/99.

12. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information.

13. Investigative Standards for Background Investigations for Access to Classified Information.

14. Pain Management Evaluation of Jerome Alford by Dr. Steven Savlov, 10/28/94.

15. Application for Merit Staffing, 4/1/99.

16. Certificate of Eligibility, 1972.

17. Supplemental Experience & Supervisory Appraisal, 4/1/99.

18. Results of Appraisal, 9/19/99.

19. Civilian Leave & Earnings Statement, 7/29/00.

20. Calculation of Economic Losses, Doran Anderson Nelson, CPAs.

21. State of Washington Emergency Worker Identification Card, Jerome A. Alford, issued 7/21/95.

22. State of Washington Fire Training Academy Identification Card, Jerome A. Alford, Emergency Vehicle Accident Prevention certification, 4/09/94 .

23 Federal Communications Commission Form 660, Amateur Radio License, Jerome A. Alford, 2/18/97.

24. Federal Communications Commission Form 574-L, Radio Station License, Jerome A. Alford, 2/17/95.

25. PSNS Form 5510/45, Authorization to check security badges, Jerome Alford.

26. Radio Permit, Jerome A. Alford, PSNS Security Office.

27. Certification, Basic Firewatch Instruction, J.A. Alford, 10/28/96.

28. Authorization to carry firearms, OPNAV 5512/2, Jerome A. Alford, 2/4/88.

29. Special Achievement Award.

30. PARS Awards.

31. Hazardous Materials Handling Award.

Defendant's Exhibits

ACTION BY THE COURT

(a) This case is scheduled for trial before a jury on January 2, 2001, at 0930.

(b) Trial briefs shall be submitted to the court on or before December 22, 2000.

(c) Jury instructions requested by either party shall be submitted to the court on or before December 22, 2000. Suggested questions of either party to be asked of the jury by the court on voir dire shall be submitted to the court on or before December 22, 2000.

(d) (Insert any other ruling made by the court at or before pretrial conference.)

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 22 day of December, 2000.

//s// Robert J. Bryan
UNITED STATES DISTRICT JUDGE

FORM APPROVED

//s//
R. STUART PHILLIPS, WSBA #29701
19307 Eighth Ave. NE, Suite B
Poulsbo, WA 98370
(360) 598-6232
Attorney for Plaintiff

//s//
ERIC A. MENTZER, WSBA#21243
Office of the Attorney General
629 Woodland Square Loop SE
Olympia, WA 98504-0126
(360) 459-6600
Attorney for Defendants

Plaintiff's Exhibit 2

0711605

IN THE [X] DISTRICT [ ] MUNICIPAL COURT OF
[X] STATE OF WASHINGTON PLAINTIFF VS. NAMED DEFENDANT
[ ]CUNTY OF GIG HARBOR
[ ] CITY/TOWN OF

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	IDNO. (SSN IF CV)
ALFORJA486QC	WA	00	

NAME: LAST	FIRST	INITIAL
ALFORD	JEROME	A

ADDRESS: 13688 NW COHO RUN [ ] IF NEW ADDRESS [ ] PASSENGER

CITY	STATE	ZIP CODE	EMPLOYER
BREMERTON	WA	98312	

RACE	SEX	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	RESIDENTIAL PHONE NO.
W	M	11-03-52	5-08	182	BRN	BRN	( )

VIOLATION DATE ON OR ABOUT — MONTH 11 DAY 22 YEAR 97 TIME 24 HOUR 1955 [ ] INTERPRETOR

AT LOCATION E/B SR 16 M.P. 15 CITY/COUNTY OF PIERCE

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND . . .

VEHICLE LIC. NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
	WA	98	87	CAD	FLTWD	L/DR	RED

TRAILER #2 LICENSE NO	STATE	EXPIRES	TR. YR.	TRAILER #3 LICENSE NO	STATE	EXPIRES	TR

OWNER/COMPANY IF OTHER THAN DRIVER SAME — ADDRESS — CITY — STATE — ZIP CODE

ACCIDENT [NO] NR R I F	COMMERCIAL VEHICLE [ ] YES [ ] NO	HAZARD PLACARD [ ] YES [ ] NO	EXEMPT [ ] FARM [ ] FIRE VEHICLE [ ] R.V. [ ] OTHER

DID THEN AND THER COMMIT EACH OF THE FOLLOWING INFRACTIONS

VIOLATION/STATUTE CODE	VEHICLE SPEED	IN A	ZONE	[ ] SMD [ ] PACE [ ] AIRCRAFT
RCW 46.37.280				

UNLAWFUL FLASHING HEADLIGHTS
WIG WAGS

2. VIOLATION/STATUTE CODE	
3. VIOLATION/STATUTE CODE	

		PENALTY
		U.S. FUNDS $ 66.00
	RELATED NO.	DATED ISSUED 11/22/97

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFESNE(S). I PROMISE TO RESOND AS DIRECTED ON THIS NOTICE	I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE. THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S). AND MY REPORT WIRTTEN ON THE BACK OF THIS DOCUMENT IS TRUE AND CORRECT.
X //S// JEROME A. ALFORD DEFENDANT'S SIGNATURE	OFFICER //S// J. HANER 1111 OFFICER PIERCE CO. 11/22/97

YOU MUST RESPOND TO THE COURT BELOW ACCORDING TO THE INSTRUCTIONS ON THE REVESE SIDE OF THIS NOTICE

PIERCE COUNTY DIST CT #2
6659 KIMBALL DR NW #503-E
GIG HARBOR, WA 98335

WASINGTON UINFORM COURT DOCKET – DEFENDANT COPY

BACK SIDE OF TICKET IS UNREADABLE
EXCEPT FOR SIGNATURE BLOCK

NAME JEROME A. ALFORD

STREET 1728 Gregory Way

CITY Bremerton STATE WA ZIP 98337

X /S/ JEROME A. ALFORD

Plaintiff's Exhibit 3

COURT ORDER / TIME PAY AGREEMENT

NAME_____ CASE NO. _____

_____ DOV _____

ADDRESS

_____

JUDGMENT	AMOUNT DUE	
CHARGE #1:	C NC (D)	$_____
CHARGE #1:	C NC D	$_____
CHARGE #1:	C NC D	$_____

D I S M I S S E D

_____ DISMISS UPON PAYMENT

_____ PAY FULL AMOUNT TODAY

_____ RESET FOR_____

_____ _____

_____

I promise to pay $_____ imposed in this action on or before _____. If this sum is not paid, I shall appear and request an extension, community service/restitution or show cause why payment cannot be made. I understand that if I fail to pay on the date specified, the above amount will be due immediately and a penalty of $47 will be added. The Court will notify the Department of Licensing of my failure to pay.

In the event the Court dismissed this ticket upon payment of costs and I fail to pay as required, the Court will reverse the dismissal and notify the Department of Licensing which will place this ticket on my driving record.

I understand that my failure to respond, appear for any hearing, or pay a monetary assessment will result in the suspension of my driver's license or privilege to drive until I have paid all penalties required by law.

I further understand that the Court will refer this unpaid account to a collection agency and I may be responsible for collection fees, reasonable attorney fees and costs.

//s// Jerome A. Alford 3-4-98

Defendant Date

//s// TAF/KJG

Judge / Clerk

Pierce County District Court No. Two
6659 Kimball Drive N.W., Suite E-503
Gig Harbor, Washington 98335

Tape recorder and tape to be returned to defendant or atty Tyner. [handwritten]

D. Nelson

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ORDER

DEFENDANT Alford, Jerom [sic]				AKA			
ADDRESS Notify the Court of any change in address				BIRTHDATE		IN CUSTODY [ ]	
Case No.	**Charge/Section/ BAC**	**Amended to**	**Dispo**	**Jail Time**	**Jail Susp**	**Credit Time Srvd**	**S**
1.970711005	unlawful use						
2.970002012	intercept/record private		DISMISSED				
3.							
4.	—						

Instead of being required to spend your entire sentence in jail, you have been placed on probation. You must obey all laws of this state. You must also follow every condition marked on this order, including any additional conditions set by your probation officer. If you do not comply the court may issue a warrant for your arrest, impose additional jail time and/or costs; in traffic cases, your license will be suspended

___ PAY RESTITUTION: $_____ MONEY ORDER PAYABLE TO THE VICTIM, sent to the court by ___ for forwarding to victim___ **YOU MUST PAY** FINE/COST/BF/PROBATIONS FEES OF $_____ BY _____.

___ DO ___ HOURS OF COMMUNITY SERVICE _____ (REQUIRES $9 FEE/INSTRUCTIONS AT COUNTER)

___ BAIL FIXED AT $____ CASH/BOND; __ RELEASE IMMEDIATELY; __ PR'D; __ PR'D TO PRETRIAL SERVICES

___ BAIL BOND; __ EXPONERATED; __ REINSATED; x CASH BAIL REFUNDED TO POSTER; __ RETAIN $____ AS FINE/COSTS

___ **REPORT TO JAIL ON ____ AT _____ AM/PM**

___ DO ____ DAYS OF HOME DETENTION. SIGN UP BY: ____/COMPELTE BY: _____. (INSTRUCTION SHEET GIVEN)

___ DO ____ DAYS OF WORK CREW SIGN UP BY: ____ /COMPLETE BY:_____.(INSTRUCTION SHEET GIVEN)

___ DO _____ DAYS AT THE DWI ALTERNATIVE FACILITY AND FILE PROOF BY ___. (INSTRUCTION SHEET GIVEN)

___ YOUR LICENSE IS SUSPENDEDIMMEDIATELY. YOU MUST GET INSTRUCTIONS FROM DEPT. OF LICENSING ON THE LENGTH OF SUSPENSION AND REINSTATEMENT OF YOUR PRIVILEGE TO DRIVE.

LICENSE SURRENDERED: __ YES __ NO

___ IF A VAILD LICENSE IS SHOWN BY _____, THE FINE WILL BE REDUCED TO $_____

___ THIS CASE IS CONTINUED UNTIL _____, UPON COMPLIANCE WITH THIS ORDER, THE CHARGE WILL BE: __ DISMISSED __ AMENDED TO _____

___ DO NOT DRIVE WITH A BREATH/BLOOD READING OF .08 OR ABOVE WITHIN TWO HOURS OF DRIVING.

___ DO NOT REFUSE TO SUBMIT TO A TEST OF YOUR BREATH/BLOOD TO DETERMINE ALCOHOL CONCENTRATION UPON THE LAWFUL REQUEST OF A LAW ENFORCEMENT OFFICER.

___ YOU ARE ORDERED TO HAVE NO (HOSTILE) CONTACT WITH _____ YOU MUST COMPLETE THE FOLLOWING AND FILE WRITTEN PROOF BY _____

___ HAVE AN ALCOHOL/DRUG ASSESSMENT AND COMPLY WITH ANY RECOMMENDED FOLLOW-UP TREATMENT IMMEDIATELY. AS A MINIMUM, YOU MUST COMPLETE AN ALCOHOL/DRUG INFORMATION SCHOOL.

___ ATTEND VICTIMS IMPACT PANEL.

___ ATTEND _____AA MEETINGS PER WEEK.

___ ATTEND DEFENSIVE DRIVING SCHOOL ___ TRACK I; ___ TRACK ii

___ HAVE A DOMESTIC VIOLENCE EVALUATION AND COMPLY WITH ANY RECOMMENDED FOLLOW-UP TREATEMENT IMMEDIATELY

___ ***YOU ARE ORDERED TO APPER FOR AN APPOINTMENT WITH YOUR PROBATION OFFICER ON _____ AT _____ AM/PM.*** YOU WILL BE UNDER DIRECT SUPERVISION OF YOUR PROBATION OFFICER TO COMPLY WITH ALL ORDERS OF THE COURT AS INDICATED ABOVE AND **ANY COUNSELING AS DEEMED APPROPRIATE.** REPORTING WILL BE DIRECTLY TO YOUR PROBATION OFFICER. FAILURE TO REPORT TO PROBATION OR COMPLY WITH PROBATION CONDITIONS IS A VIOLATION OF THIS COURT ORDER.

_____

_____

YOU MUST RETURN TO COURT ON 2/18/98 AT 1:30 (AM)/PM FOR _____

I HAVE RECEIVED A COPY OF THIS FORM DONE IN OPEN COURT 2/11/98

/S/ Jerome A. Alford /s/ Pro tem R.

Plaintiff's Exhibit 4

Washington State Patrol
REPORT OF INVESTIGATION

Initial Report

Type of Investigation Illegal Audio Recording			**Case/Evidence Number**	
Date of Incident 11-22-97	**Time of Incident** 19:20	**Date Reported** 11-22-97	**Time Reported**	**Location of Indicent** Eastbound SR-16 MP 15
Charges Unlawful Audio Recording				

SUSPECTS

Suspect No. 1 (Last, First M) Alford, Jerome Anthony (Tony)								**Suspect No. 2 (Last, First M)**						
Street Address 13688 NW Coho Run			**Home Phone**					**Street Address**			**Home Phone**			
City, State, Zip Code Bremerton, Wa. 98312			**Work Phone**					**City, State, Zip Code**			**Work Phone**			
Diver's License # ALFORJA486QC		**State** WA	**Social Security Number** 538-44-1611					**Driver's License #**		**State**	**Social Security Number**			
Race W	**Sex** M	**DOB** 11-03-52	**Height** 6-8	**Weight** 182	**Eyes** BRO	**Hair** BRO	**Compl**	**Race**	**Sex**	**DOB**	**Height**	**Weight**	**Eyes**	**Hair**	**Compl**
Clothing Blue Jeans, Blue T-shirt, Leather Jacket								**Clothing**							
Scars Marks Tattoos			**Date Booked** 11-22-97	**Location Booked** Pierce Co. Jail				**Scars Marks Tattoos**			**Date Booked**	**Location Booked**		
Employer/Occup Buds Tavern, Puget Sound Naval Shipyard								**Employer/Occup**						

VICTIMS

Victim No. 1 (Last, First M) Joi Haner								**Victim No. 2 (Last, First M)** Gerry Devenpeck						
Street Address 5524 Soundview Dr.			**Home Phone**					**Street Address** 5524 Soundview Drive			**Home Phone**			
City, State, Zip Code Gig Harbor, Wa. 98335			**Work Phone** (253)858-8800					**City, State, Zip Code** Gig Harbor, Wa. 98335			**Work Phone** (253)858-8800			
Diver's License #		**State**	**Sex** M	**DOB**				**Driver's License #**		**State**	**Sex** M	**DOB**		
Employer/Occup Trooper Washington State Patrol								**Employer/Occup** Sergeant Washington State Patrol						

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WITNESSES

Witness No. 1 (Last, First M)								**Witness No. 2 (Last, First M)**						
Street Address			**Home Phone**					**Street Address**			**Home Phone**			
City, State, Zip Code			**Work Phone**					**City, State, Zip Code**			**Work Phone**			
Diver's License #		**State**	**Sex**	**DOB**				**Driver's License #**		**State**	**Sex**	**DOB**		
Employer/Occup								**Employer/Occup**						

I certify (declare) under penalty of perjury under the laws of the state of Washington that the attached reports are true, correct, and accurate (RCW 9A.72.085)

Officer's Signature/Bad Number Trooper J. Haner, #1111	**Dist** 01	**Det** 14	**Date Signed** 11-23-97	**Place Signed** Pierce County

Supervisor	**Date**

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Washington State Patrol
Report of Investigation
Alford, Jerome A
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On Saturday, November 22, 1997 while traveling westbound on SR-16 I observed a disabled vehicle eastbound SR-16 approximately milepost 17.5. As I was passing the vehicle I observed another vehicle pulling in behind the disabled. I turned around in the median at 154th St and proceeded to the disabled. I pulled in behind the vehicle which I saw pull over. It was a maroon Cadillac. As I exited my vehicle I noticed an individual walking back towards me. As he approached he stated that they had a flat tire and needed a flashlight. This individual then immediately got in the Cadillac and left. I contacted the two individuals who were changing a flat tire and one of them had a yellow plastic flashlight. The person holding the flashlight stated, "I take it the other guy is not a cop?" I asked him why he thought he was a cop and he stated that when he pulled up he had wig wag headlights. I confirmed with him that it was the Cadillac that just left and he stated that was right. I then left and tried to catch up to the Cadillac.

At 1920 I advised communications that I was stopping the vehicle and to have Sergeant Devenpeck contact me. The vehicle's rear license place was unreadable do to a dark tinted license plate cover. I contacted the driver and asked him why he left his flashlight with the disabled and he stated that he

has several of them. I asked him about the wig wag headlights that he had and he stated that it was his alarm that he could put it on mute and the headlights will flash two and two. He stated that they were not wig wags. He stated that he uses them along with this four way flashers every time he pulls over for safety. I asked him to show me how they work and he tried several times and could not get them to work. I informed him that he could not have flashing headlights he could only use his emergency flashers. I asked him for his driver's license and identified the driver as Mr. Jerome Alford. While I was speaking with Mr. Alford I noticed that he had a amateur radio installed in his vehicle and was monitoring the Kitsap County Sheriff's Office frequency. There was a microphone attached to the radio. I also noticed a portable scanner on the seat next to Mr. Alford. Mr. Alford did stated that he use to be a Trooper in Texas and a Puget Sound Naval Shipyard Police Officer in the '80's. He was now a bouncer at Bud's Tavern in Milton. I asked him if he had a gun in the vehicle and he stated that he did not he only had handcuffs.

Sergeant Devenpeck then contacted me and I informed him of what I observed and was told. I told Sergeant Devenpeck that I believed Mr. Alford was a "want to be cop". Sergeant Devenpeck then contacted Mr. Alford and talked to him about his wig wag headlights. Mr. Alford could not get his wig wags to work for Sergeant Devenpeck either. After several minutes of discussing the headlights and looking under the hood of the vehicle Sergeant

Devenpeck advised me to remove Mr. Alford from the vehicle for he was tape recording us. I removed Mr. Alford from the vehicle and Sergeant Devenpeck retrieved the tape recorder and advised Mr. Alford he was under arrest for making an illegal tape recording. Mr. Alford was placed into custody approximately 2010.

I advised Mr. Alford of his Constitutional Rights and he stated that he understood them. Mr. [end of page]

[new page]

Washington State Patrol
Report of Investigation
Alford, Jerome A
Page 3

Alford stated that he did the same thing to Pat Jones (Kitsap County Sheriff) and they dropped all the charges and apologized to him. He said that case law State of Washington v. Flores says that tape recordings on public highways does not fall under the privacy act and he checked with the ACLU and we were wrong.

I took Polaroid pictures of the location of the wig wag switch and tape recorder.

The tape and tape recorder were taken as evidence. I listened to the tape which had my entire contact with

Mr. Alford on it as well as the conversation with Sergeant Devenpeck. I had no idea that there was a tape recorder in Mr. Alford's vehicle or that I was being recorded until Sergeant Devenpeck observed the recorder.

Mr. Alford was booked into the Pierce County Jail for making an illegal audio recording without knowledge or consent and was issued a notice of infraction for having the wig wag headlights on his vehicle.

Plaintiff's Exhibit 5

Washington State Patrol
REPORT OF INVESTIGATION

Initial Report

Type of Investigation 9.73.030 Recording Conversation			**Case/Evidence Number**	
Date of Incident 11-22-97	**Time of Incident** 19:20	**Date Reported** 11-23-97	**Time Reported** 14:55	**Location of Indicent** SR 16 at Burnham Dr.
Charges 9.73.030(3) Intercepting, recording or divulging private communication—Consent required—Exceptions				

SUSPECTS

Suspect No. 1 (Last, First M) Alford, Jerome A				**Suspect No. 2 (Last, First M)**			
Street Address 13688 NW Coho Run		**Home Phone**		**Street Address**		**Home Phone**	
City, State, Zip Code Bremerton, Wa. 98312		**Work Phone**		**City, State, Zip Code**		**Work Phone**	
Diver's License # ALFORJA486QC	**State** WA	**Social Security Number** 538-44-1611		**Driver's License #**	**State**	**Social Security Number**	
Race W	**Sex** M	**DOB** 11-03-52	**Height** 5'8"	**Weight** 182	**Eyes** BRO	**Hair** BRO	**Compl** RUD
Clothing				**Clothing**			
Scars Marks Tattoos	**Date Booked** 11-22-97	**Location Booked** Pierce County		**Scars Marks Tattoos**	**Date Booked**	**Location Booked**	
Employer/Occup PSNS				**Employer/Occup**			

VICTIMS

Victim No. 1 (Last, First M) Haner, Joi J.				**Victim No. 2 (Last, First M)** Devenpeck, Gerald L.			
Street Address 5524 Soundview Dr.		**Home Phone**		**Street Address** 5524 Soundview Dr.		**Home Phone**	
City, State, Zip Code Gig Harbor, Wa. 98335		**Work Phone** 253-858-8800		**City, State, Zip Code** Gig Harbor, Wa. 98335		**Work Phone** 253-858-8800	
Diver's License #	**State**	**Sex**	**DOB**	**Driver's License #**	**State**	**Sex**	**DOB**
Employer/Occup Washington State Patrol				**Employer/Occup** Washington State Patrol			

WITNESSES

Witness No. 1 (Last, First M)				**Witness No. 2 (Last, First M)**			
Street Address		**Home Phone**		**Street Address**		**Home Phone**	
City, State, Zip Code		**Work Phone**		**City, State, Zip Code**		**Work Phone**	
Diver's License #	**State**	**Sex**	**DOB**	**Driver's License #**	**State**	**Sex**	**DOB**
Employer/Occup				**Employer/Occup**			

I certify (declare) under penalty of perjury under the laws of the state of Washington that the attached reports are true, correct, and accurate (RCW 9A.72.085)

Officer's Signature/Bad Number G.L. Devenpeck 164 //s//	**Dist** 01	**Det** 14	**Date Signed** 11-23-97	**Place Signed** Pierce County

Supervisor	**Date**

REPORT OF INVESTIGATION

On November 22, 1997, at 7:20pm, Trooper Joi Haner requested contact while he was stopping a vehicle eastbound on SR 16 near Burnham Dr.

I arrived at the scene at 7:32pm, and Trooper Haner told me that he had contacted a disabled vehicle and another vehicle has been behind the disabled and the driver of that vehicle left as soon as Trooper Haner arrived. Haner told me that the occupants of the disabled vehicle told him the vehicle that had stopped had turned on wig-wag flashing headlights. The occupants of the disabled vehicle questioned Haner about the subject that had stopped being a police officer.

After receiving the information about the wig-wag headlights and insuring the disabled would be able to make repairs, Haner pursued and stopped Washington license N7ERW, a 1987 maroon Cadillac.

Haner contacted the driver, Jerome A. Alford, 11-03-52, and asked him about the wig-wag violation.

After I arrived Haner told me that the subject had left the disabled in such a hurry that he left his flashlight. He also said that Alford had multiple scanners or radios in his vehicle and while he was

talking to the subject he could hear policy calls. Haner said the subject could not get the wig-wags working. Haner said he felt the subject was a "wanta-be cop."

I checked the RCW on wig-wag headlights and confirmed that RCW 46.37.280 subsection 3 prohibited flashing lights. I then contacted Alford and advised him of the violation and asked him to display the operation of the lights. Alford said the lights were part of his alarm system that he just had installed and he wasn't familiar with the exact operation. Alford then handed me an RCW book and said he had checked in the book and they were legal. I turned to the correct RCW and pointed it out to him. Alford asked me not to let the book get wet as it was expensive.

While I had been talking to him he had pointed to an alarm box in the back seat. I asked him to show me in the instruction manual where it said that the headlights flash in an alternating fashion. He removed the box from the back seat and took out the directions. He was unable to show me in the directions anything about alternating flashing of the headlights.

I asked him to open the hood of the vehicle and step out so I could look for a flasher unit that powered the

wig-wags. He did so and I was not able to locate a flasher unit. After Alford got back in his vehicle he moved the alarm box to the passenger side of the front seat and disturbed a red jacket that had been on the seat. While I was standing outside of the vehicle I saw something shiny black exposed where the jacket had been moved. Based on the subjects behavior I was concerned that it was a weapon, so I looked very closely and could see that it was a tape recorder and the play and record buttons were pushed down. I requested Haner remove Alford from the drivers side of the vehicle, which he did.

I removed the tape recorder from the vehicle and confirmed that it was operating. I rewound the tape a short distance and could hear my voice and Alfords voice on the tape. At no time during my conversation with Alford did he announce his intentions to record my conversation or did he ask my permission to be recorded. The concealment of the recording device is an indication of his intent to clandestinely record the conversation in violation of RCW 9.73.030.

After Haner had removed him from the vehicle at approximately 8:10pm, I placed him under arrest for making an illegal tape recording. Alford said something to the effect that it was not illegal because of State of Washington -v- Florez. He went on to say that it was not in violation of 9.73.030. I advised him that it was a violation of subsection 3 and that he

had not made an announcement or obtained my permission.

While I was inventorying his vehicle for impound, I located a switch under the steering column that appeared to me to be a wig-wag activation switch. I turned the switch on and the high beams of the headlights started flashing in an alternating manner.

Alford was transported to Pierce County jail by Haner and booked for violation of RCW 9.73.030 and issued a notice of infraction for unlawful flashing headlights.

Plaintiff's Exhibit 7

WASHINGTON STATE PATROL PROPERTY / EVIDENCE REPORT PAGE__ OF __

[ ] EVIDENCE [ ] SAFEKEEPING [ ] FOUND [ ] ASSET SEIZURE

OBTAINED BY(LAST, FIRST, MI)	BADGE#	DIST / DET / UNIT	CASE / PROPERTY NUMBER
HANER JOI J	1111	1-14	97-0131104-01
[x] DEFENDANT [ ] OWNER [ ] FINDER		LOCATION OBTAINED (ADDRESS,STREET, HWY, MP0 E/B SR 16 MP 15	

NAME	DOB			
ALFORD, JEROME A.	11-3-52	[ ] WACIC / NCIC CHECKED	DATE OBTAINED	11-22-97
STREET ADDRESS 13688 NW COHO RUN	HOME PHONE -	[ ] ENTERED INTO COMPUTER	TIME OBTAINED	2000
			DEPOSITED	11-23-97
		[ ] VIN NUMBER CHECKED	TIME DEPOSITED	0200
		[ ] FOUND PROPRERY MSG SENT		

CITY, STATE, ZIP CODE	WORK PHONE	CITATION #	COURT	
BREMERTON WA 98312	-		DIST#2	

AFFIX ATTACHMENTS HERE

[ ] ADDITIONAL DEFENDANT [ ] OWNER		[ ] ADDITIONAL DEFENDANT [ ] OWNER	
NAME	DOB	NAME	DOB
STREET ADDRESS		STREET ADDRESS	

CITY, STATE, ZIP CODE			CITY, STATE, ZIP CODE		
HOME PHONE	WORK PHONE	CITATION 3	HOME PHONE	WORK PHONE	CITATION #

ITEM #	QTY	PROPERPY DESCRIPTION LIST MANUFACTURERS NAME, CALIBER, ARTICLE TYPE, MODEL #, SERIAL #, OWNER APPLIED #, IF APPLICABLE	ITEM WEIGHT	PACKAGE WEIGHT	PKG#	BIN #
AH6 375	1	GE Tape Recorder				
AH6 376	1	TDX 90 Minute Audio Tape				

RECEIVED BY

IGNATURE OF PROPERTY CUSTODIAN **PERSONNEL #** **DATE/TIME**

ADDITIONAL REMARKS (READ REVERSE SIDE FOR FOUND PROPERTY)	DISPOSAL STATUS CHECK DATE	DISPOSITION	INITIALS

Plaintiff's Exhibit 9

CHECK ONLY ONE: [X] IMPOUND [ ] EVIDENCE [ ] NON-IMPOUND TOW [ ] SEIZED UNDER RCW 69.50.505	WASHINGTON STATE PATROL AUTHORIATION TO TOW / IMPOUND AND INVENTORY RECORD

VEHICLE INFORMATION							GENERAL INFORMATION
LICENSE	STATE	YEAR	MAKE	MODEL	STYLE	COLOR	CASE / EVIDENCE NUMBER
N7ERW	WA	87	CAD	FLEET	4 DR	MAROON	

VIN	MILEAGE	REASON FOR IMPOUND
1G602S8Y8H9745025	68055	ARRESTED AAA WOULD NOT RESPOND

REGISTERED OWNER	LEGAL OWNER	DRIVER
NAME (LAST, FIRST, MI) ALFORD, JEROME A.	NAME (LAST, FIRST, MI) SAME	NAME (LAST, FIRST, MI)
STREET ADDRESS 1728 GREGORY WAY	STREET ADDRESS	STREET ADDRESS
CITY, STATE, SIP CODE BREMERTON, WA 98337	CITY, STATE, SIP CODE	CITY, STATE, SIP CODE

AUTHORIZATION AND RECEIPT

ON THIS DATE OF 11-22-97 AT 2100 (24 HOUR) PURSUANT TO RCW 46.20.435 AND/OR RCW 46.55.085/.113 AND HAVING PERSONALLY

INVENTORIED THE ITEMS IN THE DESCRIBED VEHICLE, I HEREBY AUTHORIZE MT. VIEW (TOWING FIRM) TO REMOVE THIS VEHICLE FROM SR 16 MP 15

OFFICER'S SIGNATURE //S//

I CERTIFY THAT I HAVE RECEIVED THE ABOVE VEHICLE AND ITS CONTENTS LISTED BELOW.

TOW DRIVER'S SIGNATURE //S// DOL TRUCK NO. 5G48 003 DATE 11/22/97

EQUIPMENT	DAMAGE		EVIDENCE (DRIVER'S SIDE)	EVIDENCE (PASSENGER'S SIDE)
[ ] GLOVE BOX LOCKED [X] KEYS [2] [X] AUTO STEREO FUNCTIONS [X] STEREO TAPES [3] [ ] CB RADIO [X] RADAR DETECTOR [ ] TRUNK LOCKED [X] SPARE TIRE	[X] FRONT [X] R FRONT [ ] R SIDE [ ] R REAR [ ] L FRONT [ ] L SIDE [ ] L REAR [ ] REAR	SHADE DAMAGED AREA	DASH UNDER DASH FRONT FLOOR 	DASH UNDER DASH FRONT FLOOR

(cont'd next page)

[X] JACK [ ] CHAINS [ ] OTHER _____	[ ] TOP [ ] UNDERCARRIAGE SIDE DAMAGED AREA [ ] OTHER	UNDER FRONT SEAT	UNDER FRONT SEAT
		ON FRONT SEAT	ON FRONT SEAT
INVENTORY			
Knife, - Alinco two way radio - misc clothes Kenwood multiband - Title 46 RCW book green back pack - small cooler w/misc (?) w/papers colored pens. - drugs and papers misc overcounter meds - Nokia cell phone headphones – head light		REAR FLOOR	REAR FLOOR
		ON REAR SEAT	ON REAR SEAT
		TRUNK	TRUNK
		OTHER	OTHER

Plaintiff's Exhibit 16

Washington State Patrol

Field Intelligence Report

NAME	LAST	FIRST		AKA'S	
	ALFORD,	JEROME	A.		
SEX	RACE	HEIGHT	WEIGHT	HAIR	EYES
M	W	5 08	182	BRO	BRO
DOB		SOCIAL SECURITY NO.		OTHER ID NOS.	
11 - 3 - 52		538-44-1611			
DRIVERS LICENSE NO.		STATE		SCARS, MARKS OR TATTOOS	
ALFORJA 486QC		WA			
ADDRESS				PHONE NO.	
13688 NW COHO RUN					
CITY				STATE	
BREMERTON				WA	
YEAR	MAKE OF VEHICLE	TYPE		COLOR	
87	CAD	FLE 4D		MAR	
LICENSE NO.	STATE	REGISTERED OWNER		VIN NO.	
N7ERW	WA	SAME			
OCCUPATION		EMPLOYER			
LOCATION OF INCIDENT			DATE	TIME	
EB SR16 E/O BURNHAM			11-22-97	1920	
ASSOCIATES WITH SUBJECT					
DETAILS					
SEE ATTACHED					
//S// J. HANER				1111	
REPORTING OFFICER				PERS. NO.	
01					
DIST.					
14		RETURN TO:			
Det.			WSP INVESTIGATIVE ASSISTANCE DIVISION P.O. BOX 2347 Olympia, WA 98507		

WASHINGTON STATE PATROL

FIELD INTELLIGENCE REPORT

Jerome A. Alford

Subject had pulled in behind a disabled vehicle, whose occupants believed he was a law-enforcement official because of the wig-wag headlights installed in his vehicle. As I approached, he hurriedly left the scene. After a brief conversation with the occupants of the disabled vehicle I followed the maroon Cadillac and pulled it over. Mr. Alford claimed that the wig-wags were part of his alarm system, but this could not be verified. Also, it was discovered in the course of the traffic stop that he had a tape recorder under a jacket and had been recording the entire proceedings. He had not advised me or Sergeant Devenpeck that he was doing so. He also had a second tape recorder hidden under the dash. He claims to believe that it is legal to tape conversations on public highways. He has recorded other police officers in the past, and it is my belief that he will continue to do so if stopped. He will claim that he is a former law enforcement officer out of Texas and the Puget Sound Naval Shipyard.

Mr. Alford has an amateur radio and at least one scanner in the vehicle and monitors police frequencies. All of my radio traffic concerning him was heard and recorded. He travels from Bremerton to Milton via SR 16 and 15 every Friday and Saturday night. If he is stopped again, I recommend that the contacting officer use his or her cell phone to obtain or relay any information about him.

Trooper Joi Haner, #1111

Plaintiff's Exhibit 20

The Honorable ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. WASHINGTON STATE POLICE, a Washington State Agency; JOI HANER, Washington State Patrol Officer, and JOHN DOE HANER, her husband; SERGEANT GERALD DAVENPECK, Washington State Patrol, and JANE DOE DAVENPECK, his wife, Defendants.	No. C99-5586RJB DECLARATION OF GERALD DEVENPECK

I, GERALD DEVENPECK, being over the age of 18 years and competent to testify, make the following declaration based on personal knowledge.

1. I ~~am~~ *was* [handwritten] a Sergeant with the Washington State Patrol.

2. On November 22, 1997, I was requested by Trooper Joi Haner to respond to a vehicle stopped on SR 16 which was driven by Jerome Anthony Alford. Trooper Haner had stopped Mr. Alford's vehicle

because of possible wig-wag headlights, which I knew to be a violation of RCW 46.37.280.

3. When I asked Mr. Alford to display the operation of his lights, Mr. Alford responded the lights were part of the alarm system he had just installed and he was not familiar with the exact operation. I asked Mr. Alford to open the hood so I could look for a flasher unit that powered the wig-wags but I did not observe a flasher unit.

4. When Mr. Alford returned to his vehicle he moved a jacket and I observed something shiny and black. When I looked closely I saw that it was a tape-recorded and that the play and record buttons were pushed down.

5. I then had Trooper Haner remove Mr. Alford from the vehicle and removed the tape-recorded. When I rewound the tape I could hear my voice and that of Mr. Alford. I stated that at no time did Mr. Alford announce his intentions to record our conversation nor did Mr. Alford ask permission to record the conversation.

6. While I was inventorying the vehicle for impound I located a switch under the steering column that appeared to be a wig-wag activation switch. When I turned on the switch the high beams started flashing in the alternating manner.

7. I had been trained by WSP on the general application of the Privacy Act, RCW 9.73.030, but was unsure of its applicability to the facts surrounding the situation presented by Mr. Alford's case. Therefore, as a matter of policy, I contacted a Pierce County Deputy Prosecuting Attorney to

determine the statute's prohibitions and whether I had a legal basis to arrest Mr. Alford. Based on my conversation with the Deputy Prosecuting Attorney, Mr. Alford was arrested for making an illegal tape-recording and issued a citation for unlawful flashing headlights.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

June 26, 2000
Pierce County
(Date and Place)

/s/
GERALD DEVENPECK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL

Tuesday, January 2, 2001

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* * *

[16]

Q. Where did you go to school?

A. I started out at Central – what we called Central Grade School. Then I went to Naval Avenue after that. Coontz Junior High School. And then graduated at West High School in '72.

Q. Where is that?

A. It's in Bremerton.

Q. Are you feeling okay today?

A. I could be better. I'm a little nervous; a little stressed.

Q. Are you on any medication right now?

A. Yes, I am.

Q. What is that?

A. Xanax at night and Valium along with the trial, to keep me mellow.

Q. Is that prescribed medication?

A. Yes. Dr. Shuler prescribed Xanax; and Dr. Snyder, the Valium.

Q. Why was that prescribed? Did you request it?

A. Well, I told him I still – it still bothered me about the arrest, and talking about it and reliving it was just giving me a lot of problems sleeping and concentrating.

Q. But are you able to understand what's going on here today?

A. Yes, I am.

Q. But are you able to understand what's going on here today?

A. Yes, I am.

Q. It's not affecting you?

A. No.

Q. Now, after you graduated from high school, where did you go?

* * *

[30]

about a day and a half to find where I was – took off from work and went looking for the child until we found him.

Q. Let's fast forward to November of '97. Where were you working at the time?

A. I was working at Puget Sound Naval Shipyard as an auto mechanic and part time at Bud's cocktail lounge in Milton.

Q. Why were you working the part-time job?

A. I had just started building a new house and I had the frame up and I needed some extra money, and

by working the weekends I could work on the house, to get it completed.

Q. Were you working any overtime at the shipyard?

A. I was also working overtime at the shipyard on the weekend as well.

Q. So you were doing both?

A. Yes.

Q. Now, had anything gone on in your personal life in the years preceding November of '97 that had an effect on you?

A. Divorce. And that was 1994, and it ended in 1995.

Q. Had you sought any counseling?

A. Yes, I did, for the children and myself.

Q. And how was that counseling going?

A. Very well. I had two good counselors.

Q. Who were they?

A. Well, Dr. Shuler, Gail Shuler, is one of them, and then I had a couple of other ones.

* * *

[34]

avoid leading the witness.

Q. (By Mr. Phillips) So what did you do when you got off work?

A. Well, I went to pick my car up and it was late. I got off at 4:30 and picked my car up at about 5:15, 5:30. I went over to pick the car up and it wasn't done yet, so that wasn't too good because I had to

be at work between 8:30 and 9:00 over in Milton which didn't give me much time. So I had to wait around until the car was done. They finally finished the car shortly after six o'clock. I had to dash up to my house and change my clothes and then head over to Milton to get to work.

Q. What happened then?

A. On the way down the road, I saw this car pulled off the side of the road sitting there. It looked like they were trying to jack it up. It was raining out, dark, windy. So I pulled my Cadillac over and stopped. Being a mechanic, I do it all the time. I pulled over. I set my alarm system in the car because now days, as much as you want to help somebody, you don't know if you will get mugged or not. At least if I get mugged somebody will know something is going on.

Q. How did you set the alarm system?

A. I had control – I had a control that had four buttons on it, so I pushed the couple of button [sic] that I was pretty sure would arm the system.

Q. Okay. So what happened?

A. Well, I got out of the car, and a couple of young kids, they

[35]

were teenagers, probably 16, 18 years old, were driving a small car. They had a flat tire. I believe it was the right rear tire was flat. They were trying to jack it up in the dark, and the jack kept slipping off in the mud, so I got a flashlight out, a little cheap 99-cent flashlight like you can buy at

the store, and I helped them position the jack and jacked the car up and made sure they busted the lug nuts loose.

Q. Okay. Then what happened?

A. While they were doing that, I looked at my watch, and I said, "Look guys, you can have this cheap flashlight, but I have to get to work." I said, "I've got to be at work in Milton between 8:30 and 9:00 and it's already after 7:00, so you can probably handle it on your own."

Q. Okay. So what did you do then?

A. I got in my car and headed off to work.

Q. Did you see anybody else?

A. Yes, I saw a car pull in behind me.

Q. Did you recognize the car?

A. No. Because I was already getting in my car when it pulled up. I was just going sideways as it pulled up.

Q. So what did you do then?

A. Got in my car and drove off headed toward work.

Q. When you went back to your car, did anything happen?

A. Well, the alarm went off. The lights started flashing. And as I approached the car, I guess I got too close to the sentry

[36]

on it and set it off. I forgot you had to push a button to disarm it after you alarm the system because I wasn't too familiar with it yet.

Q. Okay. What were you wearing that night?

A. Well, something similar to this. I was wearing actually blue jeans, but a western-type shirt. Dark shirt like a plaid.

Q. Any hat?

A. No. I don't wear hats.

Q. So what happens as you are driving down the road?

A. I drove down the road not very far, maybe a mile or two, not too far. A car comes up real fast behind me and then turned on some lights. I knew it then was a police car of some sort. I thought he might be in pursuit of somebody, so I pulled off and let him go by. He didn't go by, he stayed behind me, so I just pulled over.

Q. What happened then?

A. He started asking me about my headlights on my car.

Q. Have you had an opportunity to listen to what's been marked as Plaintiff's Exhibit 1?

A. Yes, I have.

Q. Is it an accurate recording of what happened that night?

A. Yes, it is. I had some music on the tape I was listening to. When the officer stopped me I turned it on and started recording.

MR. PHILLIPS: Move Exhibit 1 into evidence and as to

* * *

[50]

on the phone and he commented that he had trouble with his being more irritable around his children and he wanted to control that.

Q. Did this continue to manifest itself over a period of time after the arrest?

A. Well, I didn't hear much from him, so I assumed that it had calmed down, but then when he did contact me he had been to court twice and said he started to have nightmares about it.

Q. Did you form any sort of a diagnosis after these contacts with him relating to the arrest?

MR. MENTZER: Objection, Your Honor, to opinion testimony.

MR. PHILLIPS: Your Honor, I believe there are several cases under Rule 26.

THE COURT: Well, wait a minute. The question was, did you form a diagnosis?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: She may answer.

Q. (By Mr. Phillips) Did you form a diagnosis?

A. Again, I felt it was an adjustment reaction. But I would add, Mr. Alford also saw some other providers in our clinic for family counseling and around his divorce and also around some injuries he had which was resolving some problems at work, so we had followed him for some time, and I was also including a diagnosis of personality disorder not otherwise specified, which

* * *

[57]

A. It says the patient left a message stating he had spent the weekend in jail and needed something to calm him down.

Q. And what was your advice to him?

A. I asked the nurse to tell him that he could increase the Klonopin, which is antianxiety medicine that he was already on, from two milligrams, increase it to three milligrams for a week; recommend he contact his therapist, and I don't know if she documented it, but she set up an appointment with me, also.

Q. And what was Mr. Alford's demeanor at that time?

A. When I saw him on December 5th, which was about two-and-a-half weeks after that, he was still pretty agitated. He just talked nonstop.

Q. You also diagnosed him – you have several diagnoses written down here. One's the adjustment reaction for anxiety. Could you explain undifferentiated somatoform disorder?

A. Well, that was the diagnosis that was added when he was evaluated at the clinic by some of the other providers for some of the physical problems he was having, and with undifferentiated somatoform disorder, there's one or more physical complaints, but when they are medically assessed, either they can't really explain where the symptoms or pain are coming from, or if there is a general medical condition, it – the symptoms

and disability are beyond what you would normally expect from the findings.

Q. Now, on December 16th, looking at the chart note there.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL

Wednesday, January 3, 2001

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of the car. We're sitting on the side of the road on the shoulder, Highway 16, and they patted me down to make the arrest; leaned me up against the car to pat me down.

Q. How did they lean you up against the car?

A. Just kind of a nudge, kind of pushed me up against the car.

Q. So they pushed you up against the car?

A. Right.

Q. How did they pat you down?

A. The usual way. They went from, you know, up and down my sides, on my legs, and under my arms and back and front.

Q. Okay. And what did they tell you?

A. I was being arrested for illegal tape-recording.

Q. Did you respond to that?

A. Yes, I did. I said, "What?" I said, "Illegal tape recording?" And they said, "Yes."

Q. What happened after that?

A. I told them at that point it was not illegal to tape-record them.

Q. I'm sorry, how did you tell them?

A. Well, I told them that the statute, I had a similar experience with the Kitsap County Sheriffs, and at that point I requested information via the ACLU in Seattle and they sent me case law on the statute as to tape-recording, that the right of privacy is a reason not for an officer doing his job. It's all public record.

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Q. Let's go back to that incident with Kitsap County. About when did that happen?

A. That was in July. Late June, early July of that year.

Q. What year?

A. That year, 1997.

Q. Okay. What happened then?

A. I was pulled over for speeding on Seabeck Highway.

Q. Um-hmm.

A. And the deputy came up to the window and told me I was speeding, and I, of course, denied it, I wasn't speeding. And I told him that, you know, "I'm recording this conversation." I had the recorder going, and he look at it, and I said, "Yes,

I'm taping this for my own protection because I know I wasn't speeding. I did nothing wrong. I didn't violate any statutes."

Q. Um-hmm.

A. And he looked at me and he said, "I forbid you to tape-record me."

Q. He said?

A. "I forbid you to tape-record me."

Q. Okay.

A. I said, "I have nothing to hide. That's why I'm tape-recording this, so when I go to court for this ticket that you are going to write me there will be no misunderstanding as to what I said."

Q. Okay. What happened?

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A. He grabbed the tape recorder and he shut it off. And I said, "I would like to talk to the supervisor out there about this." So we called down to the dispatch and he sent his sergeant out to talk to me. And I talked to him and told him the same thing. I said, "The statute and the case law says I can record this. I wasn't speeding, I have nothing to hide, and therefore I'm going to use this when I go to court."

Q. Um-hmm.

A. So the two officers went back to the sergeant's patrol car and they talked, and they came back and they said, "Well, we decided you weren't speeding so we're not going to cite you for that.

We're going to cite you for illegal tape-recording and confiscate your recorder."

Q. So what did you do after that?

A. After that I went to the courthouse and I filed a claim to get my tape recorder back because they took it.

Q. Um-hmm.

A. And they said that they would check into the law and see if it was illegal. After a couple of months, I got a letter back from the sheriff's office –

MR. MENTZER: Your Honor, I'm going to object to the hearsay.

THE COURT: Sustained.

Q. [By Mr. Phillips] What did you do to try and satisfy yourself as to what the Privacy Act said? Did you contact

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anyone?

A. Well, I contacted the ACLU a second time.

Q. Okay.

A. I told them what had happened.

MR. MENTZER: Again, same objection, Your Honor.

THE COURT: Well, there's no request for a hearsay answer yet, but the objection may be well-taken in a minute. We will see.

Q. (By Mr. Phillips) So you contacted the ACLU again.

A. Yes, I did.

Q. Did you end up getting your recorder back?

A. Yes, I did.

Q. So let's fast forward again to November 22nd. You had just been patted down and placed under arrest by Officers Devenpeck and Haner. What did you relate to them about what you had gone through with Kitsap County?

A. Well, I just advised them what had happened in Kitsap County in that time frame. It was sometime in June or July of that particular year that the same thing had occurred.

Q. Um-hmm.

A. And it was legal for me to record.

Q. Okay. Did you tell them anything else?

A. I gave them the – quoted them the name of the case law that I knew, that I was aware of, that I had received.

Q. Um-hmm.

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A. And the statute.

Q. Um-hmm.

A. And they went ahead and said, "You're still under arrested." I said, "Well, I can show you. I have a copy in the glove box from the information that was sent to me from the ACLU."

Q. So did you have that in the glove box?

A. Yes, I did.

Q. Okay. What was their reaction when you showed them that?

A. Officer Devenpeck said, "I don't need to see that. I don't care."

Q. Were those his exact words?

A. Something along that line. I couldn't give you an exact quote. But it was something along that line, that I don't need to see that; I don't care about it.

Q. Did you ever see him go look in the glove box?

A. No, he did not.

Q. Okay. So what happened after you told him that you had the case and the statute?

A. He said, "You're under arrest and put your hands behind your back," and then they handcuffed me.

Q. How did they handcuff you?

A. Well, do you want me to stand up and show you that or what?

Q. If the judge will allow.

THE COURT: Yes.

* * *

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check?" because I had my checkbook.

Q. How much cash did you have?

A. I had $375 cash on me.

Q. Okay. So would they let you post that?

A. No, they wouldn't. They wanted cash only or bail bond.

Q. Okay. So what happened?

A. I told them I could make a phone call so I can get out, because I didn't want to be in jail. I shouldn't have been arrested to begin with. And they said when they finished booking me, then I could make a phone call.

Q. Okay.

A. So I went over to the phone after, I don't know, after awhile. I made the phone call, tried to call my parents' house, and their line was busy.

Q. Why did you call your parents?

A. Well, they are the only ones I could figure that might be able to come up with some money to get me out of jail to pay the balance.

Q. Okay. Where do they live?

A. They live in Bremerton.

Q. So you tried to call your parents. What happened?

A. I got a busy signal a couple of times in a row and couldn't get through, and at that point they said, "Well, it's too late to make anymore phone calls. It's after ten o'clock, and you have to go to jail."

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Q. Okay. So what happened?

A. So they took me – they took me down to this little room, kind of like a – a bunch of little rooms in a row, four or five little cubicles.

Q. Um-hmm.

A. And they told me to take all my clothes off and put on these jail-type clothes, put all my clothes

into a bag that I had, my shoes and shirt and pants and all the stuff I had, belt and so on.

Q. Was anyone watching you while you did this?

A. Not that I'm aware of, no. I was behind a little closed curtain in a little cubical.

Q. What were the jail clothes like?

A. They kind of reminded me of hospital clothes, hospital greens, only they were a different color. They were kind of a tan color. Real flimsy.

Q. How were you feeling at this time?

A. Pretty degraded. You know, immoralized like, you know. Just like a big common criminal.

Q. So what did you do after you changed clothes?

A. Well, then I came back outside and they took me down to the cell, and they said, "You will be staying in the cell over here." It was a cell – I'm trying to guess the size of it – probably about 30-foot-by-30-foot would be a close guess.

Q. What did it look like from the outside?

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A. You couldn't see – from the outside it was just a big wall with a steel door and a small window on it. Kind of black or dark gray. The gray wall was like all cement.

Q. So what happened when they opened the door, what did you see?

A. I saw a bunch of people laying around in there. It was about ten o'clock at night. They had a few,

like picnic tables in there, like you would see at a park, with benches attached to the picnic table.

Q. Um-hmm.

A. They said, "It's going to be kind of crowded. We have about 20 something prisoners in here." It's a 12-man cell, and they had people sleeping on top of the tables and people sleeping on the benches and on the floor. They gave me kind of a rolled-up, like a straw mattress, like, I guess, like a military-type, and a blanket. I didn't have a pillow. They gave me a pillow case, so I rolled that up to make a makeshift pillow out of it.

Q. Um-hmm.

A. And told me to go and find a place on the floor to sleep somewhere.

Q. How was the lighting? How could you see where to go?

A. Real dim. They had like a dimmer. They had one light in the middle of the room with a wire mesh screen over the top, and it was like a dim, real dim light, like about a ten-watt bulb. You know how you dim your lights with a dimmer switch that goes

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down.

Q. Um-hmm.

A. It was real dim. So I just walked carefully so I would step [sic]on anybody, because I had to step over bodies to get through to find a place to lay down.

Q. Did you find a place?

A. I found a place over in the corner, far corner. It had one little spot. It was probably five or six feet by a couple feet wide. There were a couple more guys laying close to that area, so I just put the mat down there and laid down over there.

Q. So what did you do then?

A. Tried to go to sleep, tried to forget, you know, tried to relax, and it didn't work too well. There was a clock up there on the wall that I could see that had a wire mesh screen around it, and it was kind of like a lit-up background on the clock so you could read it. So I just laid down and had my face kind of staring at the clock like this (indicating) and just kept looking at the clock trying to go to sleep. And then I noticed after a few minutes, I thought, gee, there's a pay phone over there. So –

Q. Where was that?

A. It was in the jail, in the cell. It was kind of towards the middle back corner of the cell.

Q. Uh-huh.

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A. Two pay phone. So I went over there and I thought, I will go ahead and call from here and see if I can't get my folks on the phone again or get bailed out.

Q. Un-huh.

A. So I got no phone – no – I tried to call and the phone was dead at that point. It didn't work, and

I kept trying it, and a couple of the prisoners said, "Hey, that phone won't work until morning," six, seven, eight o'clock or whatever time it would be.

Q. Okay.

A. So I went to go lay back down again, kind of get off in the corner, and I was laying there for a little while and I kept looking at the clock, and about every half hour or hour I would look, like eleven, twelve, one, two. It kept clicking away. I couldn't sleep; I was just shaking. And finally I was to the point where I almost dosed off, and I saw something run beside me and it was a mouse, and that kind of gave me the heebie-jeebies, too. So then I just kind of sat up in the corner and just covered myself up with the blanket and just kept watching the clock.

Q. Could you tell us what the toilet facilities were like in the cell?

A. They had two steel toilets, stainless steel. They just kind of hung off the wall out in the middle in the open. There was no barrier around them. You just kind of walked up there and

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you just used it in front of everybody, if you had to use it.

Q. Did you have to use it?

A. Several times, from about midnight on.

Q. Why is that?

A. I had diarrhea and just nervous, I guess. The nerves were just shot.

Q. Okay. So what happened in the morning?

A. Well, I kept trying the phone, like I said, every couple hours, and finally got a dial tone. So I called my folks, and they answered the phone. And my dad is real hard of hearing, he's 85 years old. He would have been about 81 or '2 at the time and he has hearing aids. So when I called there, but when you callout on the jail phone it comes out on a recording, it says, "This is a collect call from the Pierce County Jail," and it's kind of soft, it's not very loud.

Q. Uh-huh.

A. So my dad just hung the phone up. Click. He couldn't hear nothing. So I thought, well, I will try and call somebody else.

Q. Okay. Who did you try to call?

A. I called up my girlfriend I was dating at the time. She lived over in Silverdale.

Q. Uh-huh.

A. Linda. And the phone rang and she picked it up right away and it came across that recording again, and she just hung it right up. So I tried two or three more times and she kept

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hanging up. I thought, well, this isn't going to get me anywhere. So then I called my sister up.

Q. Where does you sister live?

A. She lives in Silverdale.

Q. Okay.

A. She answered the phone. I told her what happened and where I was, and she was just about in tears on the phone. She said, "I can't believe it." She said, "I don't have any money, cash on hand; I can't come and help you out. I will get ahold of mom and dad." She said, "It's just going to kill them."

MR. MENTZER: Your Honor, I object and move to strike. It's hearsay and it's irrelevant.

THE COURT: Well, the motion to strike is granted. The jury should disregard what Mr. Alford's sister said.

Q. (By Mr. Phillips) So what happened next?

A. After my sister got on the phone, she did go ahead and call my parents. She got ahold of them because she, you know, wouldn't give you that weak recording. So she called on the phone and talked real loud to my parents, apparently.

MR. MENTZER: Same objection, Your Honor. It's hearsay.

THE COURT: Yes, the objection – well, it's not necessarily hearsay, but the objection is sustained. The jury should disregard the last answer. There's no foundation.

Q. (By Mr. Phillips) Let's go on, what happened to you. After

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you made the phone call to your sister, what did you do then?

A. I just went back down and laid down and tried to relax a little bit because I knew that, you know, she would take care of – get me out of jail somehow.

Q. About what time was this?

A. This was about 8:30 in the morning.

Q. Okay. Had you had breakfast yet?

A. Yes, we had breakfast, I believe it was around 5:00 or 6:00 in the morning, 6:30, somewhere in there.

Q. How do they handle breakfast there?

A. They brought in a whole stack of trays on a cart, one tray per person, and then they had silverware that was plastic, you know, plastic silverware to use. And they came and passed out a tray to everybody and told them everything would be inventoried. You know, don't try and hide your plastic spoons and stuff. They will all be accounted for. So I sat down to this wonderful breakfast that they supposedly had for me.

Q. What was it?

A. I had a small bowl of cereal that was like in a little hospital bowl, a little tiny one. I believe it was Kix cereal, actually. It was colored like Kix cereal. A half pint of milk. I had something that appeared to be scrambled eggs, and then something that looked like a sausage. So I tried to eat a couple of bites, but I just didn't have an appetite. I just couldn't' eat it. So I put it aside on the table, and the guy

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sitting next to me said, "You don't want it?" I said, "Well, no." He said, "I'll take it." So he ate my breakfast, and I just kind of sat there and waited. And they gave us a certain amount of time to eat, and then they came back in and they turned the lights way back down. They turned them up while we were eating so we could see what we were doing, and then they dimmed them back down real low.

Q. Okay. So what did you do after your phone call to your sister?

A. After breakfast, they have what they call a sick call where the people can go down to their dispensary, or whatever, to get medicine and that kind of stuff. And I was feeling pretty bad. I had a hammering headache, I hadn't slept, and I was tired. I thought, well, if I can go down there I can get away from this cell because this place is just – it was a small room that was all cement. They had – on the very back wall, they had like bars, and then another cement wall behind that, like they divided another cell and built it with cement. So you had some bars you could see, but you still couldn't see daylight, you had no windows.

Q. Uh-huh.

A. I thought, well, if I could get some aspirin or something for my headache, at least I'm going to get out of this place and see some daylight and see some actual human beings besides the drug users. And the one guy beside me had beat his wife with a

[112]

frying pan, so I wasn't too thrilled about being close to him either.

Q. So what happened on sick call?

A. Well, I went on sick call, and I sat there for probably a good half an hour, and this one guy told me that was sitting there, he's a – he said, "I'm a regular, I've been here plenty of times." And I said, "Well, it's my first time. I'm not too thrilled about it." So he said, "You could be here a couple three hours on sick call. They go through, you know, take their time." He said, "When are you getting bailed out?" I said, "Well, I called my sister and she's going to call my folks, I hope, and I should get bailed out pretty soon." He said, "Well, if you're sitting here in sick call" –

MR. MENTZER: Your Honor, objection. It's hearsay.

THE COURT: Sustained.

A. The assumption that I –

THE COURT: Wait a minute. Wait for a question.

Q. (By Mr. Phillips) So did you stay on sick call?

A. No. The feeling that I got from people was if I sat there at sick call, I would miss getting bailed out and be stuck there longer.

Q. So what did you do?

A. So I just told the guard there that, you know, I would rather go back to my cell and wait for my bail to be posted.

Q. Okay. So what happened then?

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A. The took me back to my cell, which was better because I was there by myself. Everybody else, I think, except for one or two people were, you know, down at sick call getting their medications and whatever.

Q. Okay. How long did you have to wait to get bailed out?

A. It was between 10:30 and 11:00 o'clock.

Q. Okay. How did that work?

A. Well, I just sat there and waited, and all of a sudden somebody came to the door – jailer, I guess it would be – and they opened the door and said, "Alford." And I said, "Yes." And he says, "Come over here to the door," and I came over to the door. and "Your bail has been posted." I said, "Great. What do I gotta do?" You know. "Follow me." And so I didn't waste any time. I got up in a hurry and I made a shot for the door.

Q. Okay. And who was there when you went outside?

A. Well, the jailer was there and deputy, and they took me down to where my – to get my clothes. It was kind of like a check-in place, I guess, where they check clothes, after you've taken them off, in a bag. So I went and got my clothes and they told me to go ahead and get dressed.

Q. Um-hmm.

A. Put my own clothes back on.

Q. Okay.

A. So I went down, in one of those little cubicles again, and

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got dressed (snaps fingers), I mean like that. I was dressed like in a minute. And then I went out in front and had to sign a receipt for my clothes that I had just put on, and they gave me back my wallet and checkbook and change, keys, personal effects that I had. I had to sign for that.

Q. Okay.

A. Then they escorted me over to an elevator and said, "Take this elevator downstairs" to whatever floor it was, "and your folks will be down there. They bailed you out."

Q. So what happened?

A. Well, I make a track in a hurry for the elevator, and I got out of there. Went downstairs, and –

Q. Who was there waiting for you?

A. My mom was there, my – my mom, my sister, and my dad.

Q. How old – you said your father was 80 what?

A. He was about 81 at the time.

Q. How old was your mom at the time?

A. Seventy-six or seventy-seven.

Q. Now, how did you go about getting your car back?

A. Well, my car was impounded over to Key Center, which I guess is over here by Purdy somewhere, if

I remember right. So I had to go get my car, and I asked my folks and sister to drive me over there, and they did. They drove me over to get my car. My mom looked at me, and she –

MR. MENTZER: Objection, Your Honor.

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THE COURT: Sustained.

MR. MENTZER: It's hearsay.

Q. (By Mr. Phillips) Keep going.

THE COURT: No; wait, wait. I sustained the objection. What's the next question?

Q. (By Mr. Phillips) Keep going telling us about going to get your car, but without relating what was said or heard.

A. They said – I was told there was money to take care of the car, to get it out of impound; if I needed the money, that there would be money to get it out. Well, I had my cash with me that I had turned in, and I was hoping that I had enough to get the car out of impound. So they drove me over to the impound place at Key Center. And I don't recall the exact charges on it. I think it was in the neighborhood of $200 to get my car out of impound.

Q. So you were able to get your car out of impound?

A. Yes. I went over to get my car, and the battery was dead, but we fired it off, got it going, and then I was able to get my car out of there. I had to pay cash. They wouldn't accept any checks either for the impound of the car.

Q. Now, were you also given a citation?

A. Yes, I was given a citation.

Q. I will hand you what's been marked as Plaintiff's Exhibit 2. Ask if you recognize that?

A. Yes, I do.

* * *

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over there with you," and I can't remember the guy's name, a young kid, probably in his early twenties, red hair, "to go with you and you guys can handle it."

Q. Okay. So how did it go?

A. We got over there and went in front of the judge.

Q. Do you remember who the judge was?

A. Not by name, no, I don't.

We got in front of the judge, and the state said –

MR. MENTZER: Objection, Your Honor, as to what the state said.

THE COURT: Sustained.

Q. (By Mr. Phillips) What happened as a result of the hearing?

A. It was dismissed. The judge dismissed it.

Q. I'm going to hand you what has been marked as Plaintiff's Exhibit 3, two pages. I will ask you if you can identify those pages. Do you recognize them?

A. Yes, I do.

Q. What are they?

A. The first page is the court order, what they call Time Pay Agreement, I guess, and on here it says, "Dismissed." And the judge's name, I can't quite make it out. It looks like T. Aflkus, something like that.

Q. And what else is written on that?

A. It says, "Tape recorder and tape to be returned to defendant or Attorney Tyner," signed by D. Nelson.

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distress. The being stopped at that particular time was not, no.

Q. Okay. Well, if you had been arrested and released on the scene, do you think you would have been distressed at that point?

A. Not nearly as much as I am now, no, sir.

Q. You had been arrested before.

A. Yes.

MR. MENTZER: I want to go back over the tape, and probably the easiest way for me to do that would be to have the tape and play the parts that I want to hear. May I approach and retrieve the recorder, Your Honor?

Thank you. I have to rewind it.

Q. (By Mr. Mentzer) You just testified that you admit that you started off your – pretty much

started off your conversation with Trooper Haner by lying to him. Is that right?

A. The only thing I said that was not the truth, that I worked with – that I was working in Texas. That's the only thing that was not true.

Q. Okay. Well, you actually testified – or you actually stated on the tape that you used to be a cop yourself, state patrol, and back in Texas.

A. Right.

Q. Have I got that right?

A. Right.

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Q. And that was not true.

A. Right.

Q. Okay. Why were you doing that, again?

A. Basically I figured if I threw another name out besides my actual police work, that he would just cut me a little bit of slack, professional courtesy.

Q. When you were at Puget Sound Shipyard—

MR. PHILLIPS: The tape is not all the way back to the beginning.

MR. MENTZER: Thank you.

Q. (By Mr. Mentzer) When you were at Puget Sound Naval Shipyard it was as a security officer.

A. My badge, the badge that I wore on my chest said police officer, it did not say security guard.

Q. Okay. One second only, I will find out where I am on the tape.

(Tape is turned on, then off.)

MR. PHILLIPS: There's music before that.

Q. (By Mr. Mentzer) Now, what is your understanding of what wig-wag headlights are?

A. My understanding of the wig-wag headlights, from what I have seen on police cars that were on the highway, is they go opposite. One will blink first, then the other, one goes off and the other goes on.

Q. When you were stopped in July by Kitsap County, that had

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A. You know, they installed it –

Q. Okay.

A. -- so it works. I mean, you put it in there and it works, it's supposed to work fine. I paid them X number of dollars. It was supposed to be in good shape.

Q. The whole thing was brand new.

A. Yes.

Q. You hadn't had wig-wag headlights before that.

A. No.

Q. Okay. You didn't have some sort of flashing headlights before that.

A. No.

Q. Okay. And the first you learned that it was broken or not working right was when Trooper Haner asked you to activate it and you couldn't.

MR. PHILLIPS: Object. Asked and answered.

THE COURT: He may answer.

A. Correct.

Q. (By Mr. Mentzer) Okay. How is it later in the conversation that you know that they ordered a new relay because that one wasn't working and you were going to get it on Tuesday or Wednesday?

A. Because the relay I ordered was supposed to make the lights stay on longer which would affect the lights as far as the parking lights and headlights flashing. They only flashed

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temporarily for few seconds and quit, whereas I wanted them to flash a few minutes while I was walking across the parking lot. So I knew the lights were working, but they weren't working to their full potential to what I understand they should be functioning.

Q. Okay. What you wanted was an improvement, not a repair.

A. Right.

Q. Now, what would happen when you would activate it? Would it be the headlights would flash?

A. Headlights and parking lights, yes.

Q. And the headlights point forward.

A. Yes.

Q. Okay. So how does that – how do the headlights add to the safety if they are pointing forward and traffic is approaching you from behind?

A. It depends what kind of roadway I'm parked on. What area I'm in. As I stated, in Search and Rescue you park on the side of a hill or side of a ditch or a median.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, at this point Trooper Haner is going back to his vehicle.

A. Yes.

Q. Okay. Now – well, I will get to that in a second. So what we hear transmitting is again your radio, not Trooper Haner's or –

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Haner goes back with your identification, registration, insurance, and when Trooper – or when Sergeant Devenpeck comes up to your car. Do you know what they were doing?

A. Not really.

Q. No idea.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Why did you carry the RCWs related to motor vehicles in your car?

A. Just – well, I read over it, you know, when the Kitsap County Sheriff pulled me over, of course. I read it and I just put it in the glove box and just left it in the car.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, that's when you are talking with Sergeant Devenpeck about why you believed the flashers were okay.

A. Correct.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, what you're talking about there is not the wig-wag headlights.

A. Right. It was about tape-recording. I was confused about what the point was.

Q. You were confused?

A. I was a little upset, so I was trying to talk to them about tape-recording, not the headlights at that point.

(A portion of the tape was played.)

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Q. (By Mr. Mentzer) Now, that says as long as you are off the roadway –

A. Yes.

Q. -- you are not impersonating.

A. Right.

Q. So it sounds to me like you're talking about wig-wag headlights.

A. At that point I was talking about the lights.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) So you're going from talking about recording –

A. To the lights.

Q. – which the officers didn't even know you were recording at that point, did they?

A. I don't know. I wasn't sure.

Q. You hadn't announced it to them.

A. I hadn't announced it to them, no.

Q. You hadn't asked for their permission.

A. No.

Q. But you went from talking about recording then to the wig-wag headlights.

A. Right.

Q. And you just testified that you hadn't had the wig-wag headlights –

A. Correct.

* * *

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A. No. No.

Q. You did not?

A. No.

Q. They were not part of the prior alarm system that was in there?

A. Not the first alarm system, no.

Q. The one that was installed on November 22nd, 1997, they were installed, flashing headlights?

A. No. The lights were supposed to be wired into the system to flash light, the parking lights. They were not wired into separate flashing lights.

Q. It's your testimony they were never – you had never had installed flashing headlights on the Cadillac that you were driving on November 22nd, 1997?

A. Correct.

MR. MENTZER: Thank you. That's all I have.

THE COURT: Okay. Thank you. You may step down.

(Witness excused.)

THE COURT: You may call your next witness, Mr. Phillips.

THE WITNESS: Do you want this book back or left up here, Your Honor?

THE COURT: Just leave it there.

MR. PHILLIPS: Call Christy Remley.

THE COURT: If you will step to the lectern and raise

* * *

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to the restroom, got up and watched TV. I'm a real light sleeper so I hear all this.

MR. PHILLIPS: Thank you.

THE WITNESS: Um-hmm.

MR. MENTZER: I don't have any questions, Your Honor.

THE COURT: Okay. You may be excused. Thank you.

(Witness excused.)

MR. PHILLIPS: We rest.

MR. MENTZER: Your Honor, I would like to make a brief CR 50 motion before we start our case.

THE COURT: Can we reserve those, or do we need to do it now?

MR. MENTZER: Well, I guess we could do it at the end of the day.

THE COURT: I would prefer to.

MR. MENTZER: All right. I can accommodate that.

THE COURT: All right, they may be reserved. And you may call your first witness.

MR. MENTZER: Thank you, Your Honor.

I will call Trooper Joi Haner.

JOI HANER, DEFENDANTS' WITNESS, SWORN OR AFFIRMED

DIRECT EXAMINATION

BY MR. MENTZER:

Q. Please state your name for the record, please.

A. Joi R. Haner.

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Q. How are you employed, Mr. Haner?

A. I'm a trooper with the Washington State Patrol.

Q. How long have you been a trooper?

A. I've been employed with the State Patrol now for nine years.

Q. And have you received any training in that regard?

A. Yes, I have.

Q. What training?

A. I went through 19-and-a-half weeks at the State Patrol Academy and then another eight weeks – or correction – six weeks of on-the-job training before graduation.

Q. Okay. When was that?

A. I graduated in May of '93.

Q. And prior to becoming a trooper, what was your educational background – or what is your educational background?

A. I've got a two-year college degree, just an AA in general studies.

Q. Now, what, generally speaking, are your duties as a trooper?

A. Traffic law enforcement.

Q. Do you ever assist disabled vehicles?

A. Yes. That's part of my traffic duties.

Q, What does that involve?

A. I will pull in be- -- if I notice a disabled vehicle, I will pull in behind them. If they have a flat tire system, changing them. Transport them off, maybe get some gas, give them water if they are overheated. Make phone calls, or have my dispatcher

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make phone calls, if needed, or call them a tow truck, if they would like.

Q. Is that a required element of your job?

A. Yes, that's part of my job.

Q. Do you have the option of stopping or not stopping when you see a disabled?

A. No, we are to stop if we see one.

Q. In 1997, who was your immediate supervisor?

A. Sergeant Devenpeck.

Q. Have you had any training in traffic laws?

A. Yes, I have.

Q. What kind of training have you received?

A. Well, through the academy we received numerous hours of traffic laws, reading them, reviewing them, being tested on them, as well as the criminal laws.

Q. Did any of that training involve flashing headlights?

A. Yes.

Q. What was your understanding of the law regarding flashing headlights?

A. Only operate as emergency vehicles were allowed to have flashing headlights or flashing lights or emergency lights.

Q. And prior to November of 1997, had you had any training of the Washington State Privacy Act?

A. What I received in the academy, as far as going over the criminal law and understanding the elements of the law.

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Q. Do you believe you understood the elements of the law?

A. Yes, I did.

Q. You were familiar with it in November of 1997?

A. Yes, I was.

Q. On November 22nd of 1997, did you stop Jerome Anthony Alford?

A. Yes, I did.

Q. Can you tell me how you came into contact or what made you come into contact with Mr. Alford?

A. Well, I was traveling westbound on State Route 16, between the overpasses of 154th and 144th in Pierce County. It's pretty close to the Kitsap/Pierce County line. I observed a disabled vehicle on the opposite side of the freeway, and as I was passing I observed another vehicle pull in behind. I decided to turn around at median at 154th and go back and check just to make sure they had everything they needed and they were all right and they didn't need any assistance. As I

pulled in behind the vehicles, they were both there. And I got out, and as I was walking up towards the occupants were standing at the front vehicle, Mr. Alford passed me and stated that they had a flat tire and needed a flashlight, and then just kept on walking and proceeded to get back in his car.

Q. Did he appear to be in a hurry?

A. Yes, he did.

Q. What made him appear that he was in a hurry?

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A. Well, he just walked right past me as he made that statement and kept on going. Normally they'll, if a citizen stops to help, they will sit there and talk with you as well as the people they are assisting. And a very common statement that they make is, "You're in good hands now, I'm going to leave. Take care."

Q. What were they doing, what were the people in the disabled vehicle doing to the car?

A. There was two males and they were changing the right front flat tire.

Q. Did you identify them?

A. No.

Q. Is it a normal procedure for you to try to identify somebody with a disabled vehicle?

A. No.

Q. Okay. Which tire was it again?

A. The right front.

Q. And where did you meet up with Mr. Alford?

A. It was between the disabled vehicle and his vehicle.

Q. Okay. Now, you didn't identify him at that point.

A. No, I did not.

Q. You didn't stop him?

A. No.

Q. Why not?

A. Because at that point I thought he was just a good Samaritan

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stopping to help. There was no reason to stop him. I didn't notice any violations or anything else.

Q. Okay. Did you make any indication of the license plate of the disabled vehicle?

A. No, I did not.

Q. Why not?

A. Because after I had made contact with the parties, they asked me if he was a cop. And when I inquired why they were under that impression, they told me that he had wig-wag headlights, and they were under the impression that he was a police officer. And at that time, Mr. Alford's vehicle was just passing us on the freeway because he had just merged into traffic, and I verified with them, I was pointing at the car, going, "That car right there?" They said, "Yeah, we thought he was a cop."

So then I made sure they were all right, they had a little yellow flashlight, were changing the tire, and had everything they needed, and then I proceeded back to my car.

Q. Did they make any indication where they received the flashlight?

A. They said Mr. Alford provided them with the flashlight.

Q. They didn't identify him by name?

A. No, they did not. They just said, "He left his flashlight here with us."

Q. Okay. So why did you go back to your car?

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A. One, that I wanted to go back and investigate what was going on. He had left his flashlight with them, and investigate that he had wig-wag headlights and why he was leaving the impression with these people that he was a police officer.

Q. Okay. Did you – did you broadcast anything over the radio?

A. Not at that time. I was trying to merge back into traffic and I was kind of having some concerns as far as what his intentions were and some fears for public safety because if he's pulling in behind cars and leaving an impression that he's a police officer, I didn't know what he was – what he was doing at that time. As I was catching up to his vehicle, I got hold of Sergeant Devenpeck and instructed him what I had and requested him to contact me.

Q. Okay. Tell me a little bit about the area where the disabled vehicle was. You mentioned it was on Highway 16.

A. Yes. In that area of Pierce County it's pretty – there's nothing around. It's just kind of desolate. The nearest exit is a mile behind us, and then it's approximately another three quarters of a mile down that road before you get to any services, and it's another two-and-a-half to three miles before you get to the next exit, and there's nothing there. It's just an exit ramp that goes into – eventually it will get to residential areas, but there's no services, no phones, no nothing. It's not a well-lit area. It's dark. Lots of bushes and brush. And as the night goes on, it becomes very desolate.

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There's nobody out there.

Q. Okay. So you mentioned that you asked Sergeant Devenpeck to contact you, is that right?

A. Correct.

Q. Okay. Did he contact you?

A. Yes, he did.

Q. What was the nature of that contact?

A. I requested him to contact me because I didn't know what I had. I thought I might have an impersonator or a "wanna be" cop, so to speak, and I wanted the supervisor there because I did not know what I was going to be getting into.

Q. What does that mean to you, "wanna be" cop?

A. It's somebody who – when I say that term, it's somebody who wants to be a police officer, has the paraphernalia. Goes around, follows police calls, is familiar with the lingo, listens to the radio traffic, but yet can't be one. And they're a person who will go around, they will pull up behind disabled vehicles, leave impressions that they are, and very – they can be at times dangerous.

Q. Have you had any experience with other people that you believe were "wanna be" cops?

A. No. This was actually my first experience with that. I have heard of other people contacting them, and I have heard of people pulling in behind disabled vehicles because several years prior to that there was a guy pulling in behind disabled

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vehicles on I-5 and –

MR. PHILLIPS: Object. Irrelevant.

THE COURT: I think we may have gone beyond the question now, counsel. What's the question to the witness?

MR. MENTZER: Well, I was asking what his understanding was of a "wanna be" cop or how he meant that term. And I believe the information, although it may have gone beyond the scope of my question, is relevant to the state of mind.

THE COURT: What's the next question?

Q. (By Mr. Mentzer) Does a person who you perceive to be a "wanna be" cop, does that cause you any professional concern?

A. Yes, it does.

Q. Why?

A. Because they will do things that cause public – concern for the public safety.

Q. In what way?

A. Well, they will pull in behind vehicles, they will assist them, but then they will take advantage of the people who are now disabled.

Q. And this is based on training that you had had?

A. Yes.

Q. This perception?

A. Yes.

Q. Okay. Now, when you say a "wanna be" cop, do you mean that in a derogatory manner?

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A. No, I do not.

Q. How do you mean it?

A. Classification, I guess. But it's not derogatory.

Q. Okay. Now, that was what you were concerned you had with reference to Mr. Alford.

A. Yes.

Q. And you explained that to Sergeant Devenpeck.

A. Yes, when he arrived.

Q. Okay. You didn't talk to him about it on the radio?

A. Just that I suspected I had a "wanna be" cop and requested his contact.

Q. Okay. How did you make contact with Mr. Alford?

A. When I stopped him, I contacted him on the passenger side of his vehicle.

Q. Well, let's go back a little bit. Did you activate emergency lights or what?

A. Yes, I did.

Q. What do those do?

A. I have a light bar on the top of my car with rotating blue lights, blue and red lights.

Q. Do you have wig-wag headlights on your vehicle?

A. Yes, I do.

Q. What's the purpose of those?

A. They're an attention getter for traffic.

Q. Did you activate them?

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A. I activated my overheads, and my wig-wags are on a totally separate switch. I don't recall if I did or not.

Q. Okay. Now, Mr. Alford responded to your emergency equipment.

A. Yes, he did.

Q. Pulled to the side of the road.

A. Yes, he did.

Q. And what did you do?

A. I then contacted him on his passenger side of his vehicle.

Q. Did you run Mr. Alford's license plate?

A. I couldn't.

Q. Why?

A. Because he had a dark, smoked, tinted license plate cover making it unreadable.

Q. You couldn't read it from where you were?

A. No.

Q. At what point could you read it?

A. As I was walking past it.

Q. How close?

A. As close as me to you or closer. I couldn't see it from my vehicle.

Q. Ten feet, what would that be?

A. Ten, maybe fifteen feet max.

Q. At 15 feet you could read it?

A. Barely. It was dirty, it was dark. I couldn't – I

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couldn't read it clearly.

Q. Now, why did you approach on the passenger side?

A. It's safer for me, and it usually catches the drivers off guard so if there's any potential violence that they are going to try to create, I usually then have – I've got better sight picture and an advantage.

Q. And did you tap on the window, or was the window already down?

A. I don't recall.

Q. Okay. What did you observe at that point when you got up to the passenger side of the vehicle?

A. When I contacted him, the first thing I observed was that he was listening into the Kitsap County Sheriff's Office frequency on his ham radio.

Q. Did that concern you?

A. Yeah, at that point. He was – at that point, yes.

Q. Why?

A. Because now I have, that I'm being told that he has suspected wig-wag lights, he's leaving the impression that he's a police officer, and he's monitoring the police frequencies.

Q. What does it matter to you whether he's monitoring the frequency?

A. Because he can hear all radio traffic and know exactly what's going on.

Q. Why is that important?

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A. Because if there's some sort of a situation that goes on or if he turns out to be a violent offender, he now has the drop. He has the advantage, he knows what's going on. He knows all the information that I know. He knows all the help that's coming and the plan of action that we're going to take to alleviate the situation the best

that we can. So he now has the advantage, we don't. We're at the disadvantage.

Q. Now, had you seen a police scanner before in stopping people?

A. Very rarely.

Q. They're not illegal, are they?

A. No.

Q. Did you notice anything unusual about Mr. Alford's?

A. Well, he had a microphone attached to it which was a ham radio, and I also noticed he had a portable held-hand scanner sitting next to it.

Q. What's unusual about that?

A. Most people that have scanners, they're in their house. They like to listen to the police frequencies and like to know what's going on. The majority of the people I've contacted who have had hand-held scanners are involved in some sort of criminal activity. They don't want the police around and they want to know where they are at all times.

Q. And what's wrong with having a microphone on the radio?

A. At that time I did not know if he was able to transmit on

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the emergency frequencies, which is illegal unless you have authorization.

Q. So what did you do?

A. I then inquired as to why he left his flashlight. And he told me that he had plenty of them, and he just – that they could have it.

Q. That was actually the first contact, the first thing you said to him, wasn't it?

A. Yes, sir.

Q. Did you notice anything unusual about – anything else unusual about the inside of Mr. Alford's vehicle?

A. Well, he had some – like a red jacket and some debris on his passenger seat, and I noticed some handcuffs in his back seat.

Q. You were present during the playing of the admitted tape yesterday –

A. Yes.

Q. -- from the stop?

A. Yes.

Q. And did that accurately portray what was going on at the time?

A. Yes.

Q. Okay. And he indicated to you that he had handcuffs.

A. Yes, he did.

Q. Did that bother you?

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A. Yes, it did.

Q. Why?

A. It was adding to my suspicion that he was an impersonator or "wanna be" cop because now he has the police frequencies, he's got a portable scanner he can take with him anywhere. He's got handcuffs to restrain somebody. And he's got lights that most people would accumulate with an emergency vehicle or a police vehicle and if they saw them while driving down the road would pull over.

Q. Okay. What happened next with your contact, with respect to your contact with Mr. Alford?

A. Well, I inquired about his flashlight, and he said that they could have it. He was – then he told me that he was – used to work for the State Patrol.

Q. That was the one in Texas that we've discussed?

A. Right. When he said State Patrol, I – at that time I was under the impression that he meant the Washington State Patrol. That's why I asked him when he worked for us.

Q. Did you believe that?

A. At that time, yes.

Q. Why?

A. Giving him the benefit of the doubt, he told me that he worked for the State Patrol, and then he changed it to Texas and the shipyard police. I had no reason not to believe him at that point.

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Q. Okay. Then what did you say, or what happened?

A. I then inquired if he had a gun in his car, and he told me that he did not, that he only had his

handcuffs and his other paraphernalia. Then I was inquiring about his headlights that the parties of the disabled vehicle had told me about.

Q. And do you remember what his response was to it?

A. Well, he said that they were part of his alarm system that he just had installed.

Q. Did you believe that?

A. Yes, and that's why I asked him to show me how – how they worked. I wanted to see how he had it installed.

Q. And what did he do?

A. He attempted to try turning them on. He was pushing buttons on and off on his key chain.

Q. Was that doing anything?

A. No, it wasn't doing anything. He was turning his four-way flashers on and turning his turn signal on, but there was no – he never got the lights to flash at all.

Q. Okay. Did you believe that he was making an honest effort to get those things going?

A. As he was going through it more and more, I was believing that he was being a little more evasive and he wasn't trying to turn them on. He was trying to avoid it.

Q. What made you think that?

A. Well, because he kept pushing the buttons, or it was looking

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like he was pushing buttons. There was no sirens going off, there was no lights being flashing, nothing was happening.

Q. Did you see any buttons in his car?

A. Just on his key chain it looked like he had some buttons.

Q. Nothing affixed to the car?

A. And there was one that I did notice down by his right knee but never did push it.

Q. He never pushed that?

A. No.

Q. At what point did you notice that?

A. Oh, as he was going along pushing the buttons and becoming a little agitated that he couldn't get it to work.

Q. Did you ask him to try that button?

A. No, I never did.

Q. Why?

A. I wanted to see if he could get it to work the way he said it was going to work and that it was his alarm, and he just kept going on and on that it was his alarm, and then – by then I forgot about the button.

Q. You did what?

A. I had forgotten about the button at that time because we had been going – conversing about his alarm, and I had been – he had pushed buttons,

and I had walked to the front of his car, looked to see if his lights were flashing, and nothing would work, and then I would come back.

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Q. Now, you mentioned that you were familiar with the law regarding flashing headlights.

A. Yes.

Q. And Mr. Alford, did he make any indication to you about any activities he might be involved in?

A. Well, he did say that he was part of Search and Rescue and Department of Emergency Management.

Q. Was it your understanding that he could have emergency lights for that?

A. No, he couldn't. As far as my understanding was, he couldn't have emergency lights for Search and Rescue or Department of Emergency Management. That he could only have like a yellow beacon.

Q. That was your understanding of the law?

A. Right.

Q. Now, at some point you – is it policy to ask for license registration and stuff?

A. Yes, it is.

Q. Did you ever ask for that?

A. Yes, I did.

Q. And what happened then?

A. I asked him for his license, which he provided, and I verified that he was still living at his current address, and he was – I don't believe he was ever able to find his registration.

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Q. Okay. And what did you do then?

A. I concluded that initial contact right there and went back to my car and ran his registration and his driver's check.

Q. Why?

A. I wanted to check wants warrants, see if he was suspended, and make sure he was the registered owner of the car.

Q. And at what point did Sergeant – or did Sergeant Devenpeck ever arrive at the scene?

A. Yes. After I had run Mr. Alford's data, Sergeant Devenpeck then arrived at the scene.

Q. And you were still in your car at that point?

A. Yes, I was.

Q. And then what happened when Sergeant Devenpeck arrived?

A. Sergeant Devenpeck contacted me, I advised him what I had, and then I – that I suspected he had wig-wag headlights but he was being evasive and not turning them on. And so – and all the other observations that I made: That he had the police frequencies, the handcuffs, and other things; that he left the impersonation that he was a police officer with the people who were disabled. And

then Sergeant Devenpeck looked up in the RCW book the flashing headlight statute.

Q. Okay. Where did he do that?

A. I believe he went back to his car and looked it up in his RCW book.

Q. Okay.

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A. Because I walked back – as I got out of my car, I observed him reading through the book.

Q. Now, when we listened to the tape yesterday, there's a long pause in between the time that you asked for the registration and the time that Sergeant Devenpeck contacts Mr. Alford. What was going on there?

A. That was the time I ran his data and Sergeant Devenpeck contacted me and I was advising him what was going on and that he was looking up the statute at that time.

Q. Which statute?

A. The flashing headlight statute.

Q. Okay. When you first contacted Mr. Alford, did he tell you you were being tape-recorded?

A. No, he did not.

Q. Did he ask you if he could?

A. No, he did not.

Q. Now, did you look around the interior compartment of his car?

A. Yes, I did.

Q. Why?

A. I – it's part of what you do when you stop a car, you're looking through the interior of the car. You want to make sure there's no handguns there, no guns, no weapons that could be used against you. Or periodically you will see drugs that they leave out plain and visible or drug paraphernalia. So you're

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looking through the car as they're there getting the paperwork and doing other things.

Q. So this is an officer safety kind of problem?

A. Yes, officer safety deal.

Q. Did you see a tape recorder?

A. No, I never did see a tape recorder.

Q. Did you know you were being tape-recorded?

A. I had no idea.

Q. And who was present when you first contacted Mr. Alford?

A. It was just myself and Mr. Alford on the side of the freeway.

Q. Was there anybody walking by?

A. No. There was nobody out there.

Q. What were the weather conditions?

A. It was cloudy and it was just a real light drizzle.

Q. Was it dark, light?

A. It was dark.

Q. And you mentioned that the streets are not lighted in that area.

A. No. They weren't lit in the area of the disabled, and in the area that we stopped, the nearest street light was the exit behind us, just to mark the exit.

Q. From where you were stopped, or where you were stopped when you were behind Mr. Alford, was – and it was just you and him; I'm specifying the period of time – were there any houses

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nearby?

A. No houses. There's a real estate business about half a mile back, but it's off the freeway. There's a – there's nothing around.

Q. No businesses, houses, or anything?

A. There's nothing in the immediate area, no.

Q. What is in the immediate area?

A. Just brush and trees.

Q. Okay.

THE COURT: This is a freeway, is it not, where you stopped him?

THE WITNESS: Yes, sir.

Q. (By Mr. Mentzer) Okay. What happened after you informed Sergeant Devenpeck of what was going on? He look at the statutes, and then what happened?

A. Then he contacted Mr. Alford.

Q. Were you with him at the time?

A. I was behind him, providing light. I was behind Mr. – or Sergeant Devenpeck providing my – as a cover officer.

Q. Now, what is his duties, or what are his duties in relationship to yours?

A. He's – he was my first line supervisor.

Q. What does that mean?

A. Well, he supervised the detachment that we had out at Gig Harbor at that time of eight people. His job was to oversee the

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work that we did, make sure the work was completed and done appropriately.

Q. What does he – does that mean you have to do what he tells you to do?

A. No. In some ways, yes.

Q. In what ways?

A. Well, if he gives us an order to go do something, then we have to do it. He's our supervisor. So you have to do what the supervisor says, but if there's an illegal order, we don't have to follow it.

Q. And how do you determine whether it's an illegal order?

A. Well, if he's giving me an order that violates the law, I don't have to follow it, or violates our regulation manual.

Q. Now, you were present when Sergeant Devenpeck went up to Mr. Alford's vehicle but you were behind Sergeant Devenpeck.

A. Yes.

Q. What side of the vehicle were you on at that time?

A. We were both on the passenger side.

Q. What happened then?

A. Sergeant Devenpeck then started conversing about the wig-wag headlights.

Q. Okay. And what was Mr. Alford's response to that?

A. I wasn't able to hear all of his responses.

Q. Okay. What was your role at this point?

A. Just a cover officer at that point, as Sergeant Devenpeck

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investigated what was going on.

Q. Okay. And you couldn't hear what was the complete conversation that was occurring?

A. No, I couldn't hear the complete conversation because the windows were up in the back.

Q. Okay. And at what point did you take an active involvement again, or did you ever take an active involvement again?

A. I took an active involvement when Sergeant Devenpeck asked me to have him removed from the vehicle.

Q. Did you do so?

A. I had him step out of the driver's side and step to the rear of the vehicle.

Q. Did you know why that was at the time?

A. At that point, no. When Sergeant Devenpeck, he came around the back of the vehicle, then I understood why.

Q. Okay. Let's go back a little bit. You didn't know why he told you to, but he asked you to remove Mr. Alford from the vehicle, is that right?

A. Yes.

Q. What did you do?

A. I had him step from the vehicle and step to the rear.

Q. Why was that?

A. That was at Sergeant Devenpeck's request, and it was not less than a few seconds later I was informed of why.

Q. Why bring Mr. Alford to the rear of the vehicle rather than

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leave him there at his door?

A. It's a safer position. Standing there by his door, traffic is zooming by us at 55, 60 miles an hour. Step to the rear of the car, there's more room, and there's space to get away from the passing traffic.

Q. And you didn't know why you were doing that?

A. Not right at that exact point.

Q. Were you wondering?

A. Yes. For a brief second.

Q. Were you concerned?

A. Somewhat, because I did not know exactly what he had found in the car or what he observed.

Q. Okay. So you brought Mr. Alford to between your car and his car?

A. Yes.

Q, What happened then?

A. At that time we got to the back of the car, Sergeant Devenpeck advised that he was recording us, and then advised Mr. Alford he was under arrest for making an illegal tape recording.

Q. What was your reaction when you heard that he was recording you?

A. At that time I believed – I was surprised he was recording us because I never did see a tape recorder.

Q. Were you looking for a tape recorder?

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A. No, I never looked for a tape recorder.

Q. Were you looking for objects?

A. I was looking for objects, yes.

Q. Do you know where Sergeant Devenpeck found the recorder?

A. He found it on the passenger seat. Front passenger seat.

Q. Were you looking in that area when you were observing the interior of Mr. Alford's vehicle?

A. Yes. Quite a bit, actually.

Q. You didn't see the recorder?

A. I never did see it.

Q. So what happened after Sergeant Devenpeck said he was under arrest for the recorder?

A. I placed Mr. Alford in handcuffs and advised him of his constitutional rights.

Q. Okay. How did you place Mr. Alford in handcuffs?

A. I just had him turn around –

Q. Explain that.

A. I had him turn around, grabbed his fingers, and then placed the left handcuff on and then the right handcuff on.

Q. Did you press Mr. Alford against the car?

A. No, I did not. I never.

Q. Why?

A. I never do it that way.

Q. Why?

A. Because it gives them a position of advantage. It gives

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them leverage, and they now have the advantage versus me. And I have never in my career used the car to handcuff a suspect.

Q. Mr. Alford was standing up then?

A. He was standing up, yes.

Q. And you had him – how did he get his hands behind his back?

A. I had him just turn around and place his hands behind his back.

Q. You asked him to do that?

A. Yes.

Q. And he did that?

A. Yes.

Q. And do you make any effort to gauge how tight the handcuffs were going on?

A. Yes. Once I put them on, once I have both handcuffs on, then I'll tighten them up, and I use my index finger. I slide my index finger between the handcuffs and his wrist to make sure there's adequate space so that they don't cut off circulation.

Q. Why do you use your index finger?

A. Because it allows enough adequate space so his hands can still move and they don't cinch down too tight, and I double lock the handcuffs so they can't tighten down at all.

Q. They can't tighten by leaning against them?

A. No. Once you double lock them, they're locked until you completely unlock them.

Q. Is using your index finger, is that part of your training in

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handcuffs?

A. No. Our training is to use actually the pinky finger.

Q. Why do you use the index finger?

A. It allows just a little bit extra space, a little more breathing room in the wrist. It makes it a little more comfortable.

Q. Then what did you do after having Mr. Alford handcuffed?

A. He was then advised of his constitutional rights, and which he stated that he understood them.

Q. Did you believe – when you heard that Mr. Alford – or Sergeant Devenpeck say that you had been recorded, or he – you had been recorded, did you believe you had probable cause to arrest Mr. Alford?

A. Yes, I did.

Q. What is probable cause?

A. It's the facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed.

Q. What about this situation made you think you had probable cause to arrest Mr. Alford for the Privacy Act violation?

A. Because the conversation was being recorded. I did not have any knowledge or give consent and he did not make any statements that the conversation was being recorded, and the fact that the tape recorder was completely hidden.

Q. Anything else?

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A. Well, under my understanding that that was in violation according to the RCW.

Q. All right. Were there any other factors you were considering?

A. No. It was based on those things. That was why he was arrested.

Q. Okay. And then what did you do after you read him his constitutional rights?

A. He was then talking about a case, Florez, but he was also mentioning Florida, and he was – he totally confused me. I did not know exactly what he was talking about. And then I placed him in my patrol car.

Q. Do you remember – do you remember whether you looked for a case or not?

A. In his vehicle?

Q. Right, in his vehicle. I'm sorry.

A. When we did go through his vehicle, the only case we ever saw was the RCW book that – or the title book that he had that Sergeant Devenpeck and him were reading back and forth in.

Q. Now, he had an RCW book?

A. Yes.

Q. What did that contain?

A. It contained the motor code.

Q. Okay. And which title was that?

A. That's Title 46.

* * *

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A. Yes.

Q. And how do you obtain copies of the cases?

A. We get monthly law enforcement digests.

Q. Is that a summary of the case or is that the case verbatim?

A. It's usually a summary of a case.

Q. In connection with your duties, have you ever read a case? The actual case rather than a summary or something.

A. No, I have never actually read the case, just summaries.

Q. What is your training on whether you have a question when you are out at the scene about the applicability of the law?

A. It's to contact the criminal prosecutor.

Q. Why is that?

A. It's because they are the ones that will be trying the case and they are the lawyers who actually read the cases and interpret them.

Q. Have you ever had anyone argue a legal perspective, make a legal argument to you about whether you were acting properly or not?

A. Usually the legal arguments they will bring up are equipment violations or motor code violations.

Q. What do you do then?

A. I'll understand their point, I will go look it up, and then I will take the book back with me and we will read over the actual statute and educate them on what it is saying and why I stopped them or why they are getting a ticket for the specific

* * *

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A. Yes. When I left the scene I was.

Q. And that was – I mean, after you had left the scene and you had the subsequent conversation with Sergeant Devenpeck about his contact with the prosecutor.

A. Yes, I was.

Q. Okay. And what happened next?

A. Well, once we arrived at the jail, and then I took Mr. Alford up to the booking area.

Q. What happened there?

A. Okay. We arrived at the jail in the sally port, and then I had Mr. Alford – before you go up into the jail, because you pull in, like he said, it's the basement, the sally port, you pull in there, and then you have to search them again in front of a video camera so that they know that there's no weapons or contraband being brought into their jail. I then did that, and we had to wait for them to send the elevator so we could go upstairs. Once we got upstairs, it's the booking area. I then directed Mr. Alford to have a seat on the bench and wait until his name was called.

Q. And were you with him the entire time?

A. Well, he has a seat on the bench, and then I proceed to another desk and have to fill out a booking form and then put it in a box, and that's how they decide – well, it's like a first-come-first-served basis, and they go through, and when they call his name, then he's called to the counter, and at that

* * *

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CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Highway 16 is a public road?

A. Yes, sir.

Q. There were cars driving by?

A. Yes, sir.

Q. You were on duty?

A. Yes, sir.

Q. In uniform?

A. Yes, sir.

Q. As was Sergeant Devenpeck?

A. Yes, sir.

Q. Driving marked patrol cars?

A. I was driving a marked patrol car. Sergeant Devenpeck has an unmarked patrol car.

Q. Okay. The purpose of coming up on the passenger side is to take the driver off guard?

A. It's an officer safety issue. It's – as I'm coming up on the passenger side, I'm away from traffic so my chances of being struck by a passing vehicle are less, as well as the majority of drivers look over their left shoulder for the police to contact, so if there is an instance where there is one who has a gun, he's looking left, I'm on the right. I now have the advantage.

Q. Did Mr. Alford ever refuse to do anything you told him to do?

* * *

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dismissed.

Q. The Pierce County Jail, is it a pretty busy place?

A. It can be, yes.

Q. Have you been there a number of times?

A. Yes.

Q. Have you ever arrested anyone for DUI?

A. Yes.

Q. Have you ever testified in court about something like that?

A. Yes, I have.

Q. Have you testified in court about other arrests you've made?

A. Yes.

Q. Have you testified in court about other citations you've issued?

A. Yes.

MR. MENTZER: I object to the relevancy of this, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Phillips) Now, what sorts of things do you generally testify to in a DUI prosecution?

A. Well, driving, physical observations that I observed, the field sobriety tests, if there were any. Speech, mannerisms, statements. The breath test.

Q. Speech. You testify as to speech. Give an example of that, if you would?

A. It would be, was his speech slurred? Was it rapid? Was it

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slow?

Q. And do drunks sometimes talk about some pretty odd things?

A. Yes.

Q. And you testify as to that?

A. Yes.

Q. Now, turning to this report of investigation. What time did you first radio to communications that you were stopping the vehicle?

A. Looking at the report, it says I stopped him at 1920, which would be 7:20 p.m.

Q. Do you have any reason to doubt the veracity of your report?

A. No.

Q. Do you generally try and do a good job putting these reports together?

A. Yes.

Q. You put as many of the essential facts as you can in the report.

A. Correct.

Q. Are you – do these often come up in criminal cases?

A. Yes.

Q. And you're cross-examined, I presume, on the contents of your reports.

A. Yes.

Q. Do you receive training on these at the police academy?

A. As, yeah, its content, what you need to put in there, yes,

* * *

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A. I don't recall him ever saying that he did.

Q. Okay. Direct your attention to page 3, request for admission 6. Now, in response to the question, "Admit or deny that Plaintiff Alford stated that he had a copy of the statute and relevant case in his glove box," what was the answer given?

A. It's "Admit".

Q. Okay. When did you first come into the Washington State Patrol?

A. October 1991.

Q. Are you're familiar with the Law Enforcement Digest?

A. Yes, I am.

Q. How often does that come out?

A. Monthly.

Q. Do you generally read it?

A. Generally.

Q. Do you at least try and take time to scan the table of contents?

A. Yes.

Q. See if there's anything of interest?

A. Yes.

Q. Do you recall anything in the Law Enforcement Digest about this case that Mr. Alford was citing to?

A. No, I do not.

Q. Do you think looking at a copy of it might refresh your recollection on this?

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A. It could.

Q. Okay.

Now that you've had an opportunity to look at this, was there ever anything in the Law Enforcement Digest about this case?

A. Apparently there was, but I don't remember seeing the Law Enforcement Digest.

Q. Hmm. And what was the date on that, that it came out?

A. I didn't look specifically at that date.

Q. Would you like to see it again?

A. Sure.

Q. Okay.

MR. MENTZER: Your Honor, I'm going to object to this. I don't see where this item has been identified as an exhibit for the plaintiff using. I guess it's one thing for him to refresh his recollection, but that's not the question before the witness. He could have him testify.

THE COURT: That's a fair objection, counsel.

Q. (By Mr. Phillips) Now that you've looked at this, have you refreshed your recollection as to whether and when this was reported in the Law Enforcement Digest?

A. Yes.

Q. When was it reported?

A. July of 1993.

Q. How long was that before Mr. Alford's arrest?

* * *

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A. Not that I recall, no.

Q. Hmmm. Really?

Would it perhaps refresh your recollection to see the policy memo put out by Chief Sandberg?

A. Oh. Before, yes, there was nothing. Afterwards, yes, there has been one put out afterwards.

Q. Oh. What is that?

MR. MENTZER: Objection to the relevancy of the policies of the State Patrol afterwards.

THE COURT: Sustained.

Q. (By Mr. Phillips) So you handcuffed him.

A. Correct.

Q. You mirandized him.

A. Correct.

Q. You frisked him.

A. Correct.

Q. You frisked him.

A. Correct.

Q. And you still maintain that you felt that it was both reasonable and prudent, given what you knew at that time, to arrest him for violating your right to privacy?

A. Correct.

Q. You maintain that to this day?

A. Well, since the arrest we've been given the case statute, and the way it's read, apparently he can do it. But at the time. I felt that everything was correct.

Q. Okay. Fair enough.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
[Caption Omitted in Printing]
EXCERPTS OF TRANSCRIPT OF TRIAL
Thursday, January 4, 2001

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* * *

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DIRECT EXAMINATION

BY MR. MENTZER:

Q. Please state your name for the record, please.

A. Gerald "Gerry" Devenpeck.

Q. And are you employed, Mr. Devenpeck?

A. Yes, I am.

Q. How are you employed?

A. I'm an airline transport pilot with AC Aviation Services of Nashua, New Hampshire.

Q. Have you ever been employed with Washington State Patrol?

A. Yes, I was, for 21 years.

Q. When did you leave the Washington State Patrol?

A. The 31st of December, 1999.

Q. Why?

A. To pursue a career as a pilot.

Q. In what capacity were you employed with the Washington State Patrol?

A. The 5th of March, 1979, I was hired as a patrol cadet assigned to executive protection at the mansion in Olympia, and the 23rd of March of 1980 I was selected to attend the 58th State Patrol Academy class in Shelton, and I graduated on the 30th of June of 1980 and was commissioned a state trooper. On the 13th of July of 1990 I was promoted to the position of sergeant.

Q. 1990?

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A. That's correct.

Q. And what were your duties as a sergeant?

A. I was a detachment supervisor.

Q. Okay. What does that mean?

A. A detachment supervisor runs the day-to-day operations of the detachment. Depending on where you are located, you have different responsibilities. Sometimes you have responsibilities for the office as a whole, and sometimes just a detachment that works out of a district office. I wouldn't want to say it's easier if you're in a district office, but you don't have the responsibilities of the facility and a secretary and the other things. You just basically have the troopers. And it's the supervisor's job to ensure that the troopers fulfill their responsibilities, traffic law enforcement and the other responsibilities that they have.

Q. How did you do that, make sure that the troopers fulfilled their responsibilities?

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A. Periodically ride with them, evaluate their reports, and different avenues like that. And counsel them and talk to them and see how they are doing.

Q. How did you see your job as far as oversight of the troopers?

A. I don't know that I understand.

Q. Well, I will skip that for now.

Was Joi Haner under your supervision?

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A. Yes, he was.

Q. When was that?

A. I think it was '96, but I'm not sure.

Q. Okay.

A. I remember the first day I rode with him when he came down, I showed him our area of responsibility and basically explained to him what my expectations were and gave him what we called an interoffice communication showing those expectations.

Q. What training did you receive with respect to your duties? As a trooper, first.

A. As I indicated, I attended the 58th Patrol Academy Class in 1980. In – in August of '90 – or excuse me – of '85 I was selected as a detective in the narcotics section, and at some point after that – well, right after that I attended the drug enforcement class put on by the Drug Enforcement Administration in Seattle and then

a State Patrol basic detectives class. Both those were two-week courses. That would have been, I think, in – I know the DEA was '85, and I think the detectives school was also in '85.

Q. Did you receive any special training relating to being a sergeant?

A. Yes, I did. That would have been in 1990, but I'm not sure of the month.

Q. Okay. As a sergeant, were you ever called out to assist troopers?

* * *

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Q. Okay. So what did you do when you contacted Mr. Alford?

A. I advised him of the information that I had been given and talked to him about the wig-wag headlights.

Q. Okay. And what did he tell you about the wig-wag headlights?

A. He started to tell me that they were legal because he had them in Kitsap County and the Kitsap County Sheriff had apologized to him and sent him a letter and that the ACLU said he could use them as long as he wasn't impersonating.

Q. What was your reaction to that?

A. I knew that he could not use them unless he had received permission from the State Patrol Equipment Standard Review section that specifically said that he could.

Q. And was it your understanding at that time that wig-wag headlights were approved for people who were volunteering for emergency management services or other kinds of things like that?

A. Wig-wag headlights are not approved for that. Green, solid green lights are approved for volunteer firefighters as long as they are solid green and mounted in a specific location. They do not give the volunteer firefighters any emergency vehicle authorization, only identification, so that when they are parked at the scene of a fire, other people will know that they are volunteer firefighters.

Q. Okay. So what did you – what did you do after Trooper

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Haner informed you that Kitsap County told him it was okay for him to have the headlights?

A. After Mr. Alford told me?

Q. Yes.

A. I continued to explain to him that it wasn't proper, and at that time I believe he pulled out an RCW book and started to show me, or handed it to me, and said that in here it's okay. And I turned to the section and pointed to him and asked him to read it and said, "It says right there that you can't have them."

Q. Okay. How did you know it wasn't okay if Kitsap County told him it was?

A. Oftentimes –

MR. PHILLIPS: Objection. It's been asked and answered. He already said this.

THE COURT: He may answer.

A. Oftentimes when you contact violators, especially, as I indicated, the State Patrol is involved in traffic law enforcement. Local police departments and sheriff's offices have specialized units which do a very similar job to what the State Patrol does, and they receive extra training on traffic laws, like we do. And you could run into a police officer that could tell you, take for example a monster truck kind of a thing. You see these pickups that are raised real high. Now, a police officer that doesn't deal with traffic law enforcement

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could very well tell someone that, yeah, that's legal, it's okay. Whereas someone who is involved in traffic law enforcement on a regular basis would say, no, if the vehicle is licensed for 6,000 pounds it can be 28 inches, if it's licensed for 8,000 pounds, the bumper can be 30 inches high. But somebody that's not involved in that wouldn't know that. It's not something you would know.

It's like if being a traffic law enforcement officer you went to a burglary, you would be kind of lost. Eventually, if you didn't ruin all the evidence while you were muddling through the scene, you could probably figure it out, because a crime, whether it be a serious traffic accident or a burglary, there's going to be evidence to the crime. Like I say, if you don't destroy the evidence

while you're trying to figure out how to find it, you could eventually figure it out, but you would have a lot of trouble. It would be kind like a brain surgeon trying to do heart surgery. They are a trained surgeon, they are just working on a different area and aren't familiar with it.

And I'm not trying to equate a trooper with a brain surgeon, don't get me wrong.

Q. So what happened next after Trooper – or excuse me – Mr. Alford informed you that he thought it was okay and you read the statute?

A. I asked Mr. Alford to step out – to raise the hood and step out of the vehicle so that I could see a flashing – flasher

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unit like the patrol cars have and – patrol cars, they are mounted on the fender wheel. They are very obvious, they are about that size (indicating) of a flasher unit. Naturally, because of the – I'm not an electrician, but because of the voltage or wattage, or whatever it is, of the lights, they need to be a large flasher unit. It's kind of like when you hook a trailer to your car, you have to get a bigger flasher unit so that the turn signals will work because the standard one on the car, that they won't work properly. So this is a big flasher because the headlights draw lots of current. And I thought maybe I would be able to see that up there. And if I would have seen it, basically what I would have had him do is disconnect them. But I wasn't able to locate the flasher unit.

Q. And then what?

A. He got back in the car – we closed the hood, he got back in the car, and continued to tell me about this alarm system. And throughout the course of this, I felt that Mr. Alford wasn't being truthful with me and continued kind of talking in circles and making statements that I just didn't think were true. I've seen several different kind of alarm systems, and when you hit the button, an alarm will chirp or beep or honk the horn, and the parking lights, and sometimes the headlights, will make a couple of quick flashes together, and that's how they operate. What he was trying to tell me, that that's what happened when he was parked with the people, and I just wasn't believing what he

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was telling me.

So I continued to question him about the alarm and asked him to show me in the instruction manual where it would say that that's what would happen when you activated the alarm.

Q. Let me step to something else real quick. What are wig-wag headlights?

A. Wig-wag headlights, there's a switch that activates them, and one light will flash, the other – and it will go off. The other light will come on, and it's just kind of like a blink-blink-blink-blink-blink because it draws people's attention. Overhead lights on a patrol car sometimes are above actually the rearview mirror of a car, and the wig-wag headlights actually show into the

back of the car very well and draw attention a lot better and actually can be seen from farther away in the daytime.

Q. Now, is that something different than what you have seen on alarm systems?

A. Oh, absolutely.

Q. How so?

A. Like I say, the alarm systems, either the parking lights and/or the headlights will come on, they will all flash, like this (indicating), and then go off.

Q. Okay. You mentioned that you asked Mr. Alford to find the manual for the alarm system.

A. Yes, I did.

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Q. What happened then?

A. Mr. Alford removed the box for the alarm system from the back seat and brought it up to the front seat and took the manual out and started to thumb through it.

Q. Okay. And then what happened?

A. He subsequently moved the box that was on the seat, and when he moved the box, it dislodged the jacket and I saw something shiny and black on the seat. This naturally aroused my suspicion and caused me concern. As I indicated earlier, that it was possible there could be a weapon. Many, many weapons are shiny and black, so it naturally got my full attention, and I looked at it, and as I was standing – if this was the door, I was

standing right outside the door and I could look down and see then that it was a tape recorder and the play and record buttons were both pushed. I lifted up the jacket and saw that it was moving, and then I advised him that he was under arrest, and I asked Trooper Haner to remove him from the car.

Q. What did that mean to you, that the play and record buttons were both pushed down?

A. That the tape recorder was in operation and actually recording at the time.

Q. And what's wrong with that?

A. I felt that it was a violation of the recording law, which is RCW 9.73.030, where it says in order to intercept or record a conversation either an individual –

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MR. PHILLIPS: I will have to object. That's misstating the statute. The statute says private conversation.

THE COURT: The objection is sustained.

Q. (By Mr. Mentzer) What was your understanding of the Privacy Act at the time?

A. That unless the person doing the recording, because Washington requires two-party consent for a recording, unless the person divulges that their conversation is being recorded and that statement is on the tape, you cannot record the conversation without your consent or knowledge.

Q. And why did you care that you were being recorded?

A. It was a violation of the statute and it's a gross misdemeanor.

Q. What would you have done had the recorder been out in the open?

A. If the recorder would have been in the open and I could have plainly seen it, even if he wouldn't have made an announcement, I would have felt that the recorder being there and in operation would have been enough of an announcement even though it didn't completely comply with the statute.

Q. Do you have a problem with citizens recording your conversations at stops?

A. Absolutely not.

Q. Would you have behaved any differently had you known you

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were being recorded?

A. Absolutely not.

Q. What did you do after you announced that Mr. Alford was under arrest?

A. I don't recall if I opened the door or reached through the window, but I removed the tape recorder from the car.

Q. When you told Mr. Alford that he was under arrest, did you believe that you had probable cause?

A. Absolutely. I felt that he was in direct violation of the statute.

Q. And that was based on what?

A. My knowledge of the statute. As I indicated, when I was a detective in narcotics, this was something that we had to deal with because of the one-party consent, and officers working undercover, unless we had a court order, we weren't able to do this type of recording.

Q. Had you had any experience with the Privacy Act prior to Mr. Alford's arrest?

A. Yes, I had.

Q. How so?

A. The State Patrol district office in Tacoma had been recently built, and during that time the captain, because of some language barriers and use of the language bank, elected to have the phone in the Breathalyzer room go through communications so it could be recorded so that the language bank calls, if they

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were made, could be used by the defendant in court. And that's how I knew. Subsequently it was found that these calls could not be recorded because nobody told the defendants that they were being recorded.

Q. Have you had any personal experience with the Privacy Act?

A. Yes, I have.

Q. How so?

A. I had a telephone conversation that was recorded by someone else illegally.

Q. By who else?

A. His name was Jim O'Neill.

Q. And is he a trooper?

A. Yes, he is.

Q. And what was the result of that?

A. It was determined that the phone call could not be recorded, and the recording was destroyed.

Q. Okay. And what was the context of your recording that? Was it on duty, off duty?

A. I actually was on duty. It involved a situation where this subject had filed a complaint with the Fair Labor Standards Act because in the patrol at the time, if a trooper wanted to work six days in one week and four days in the next week so he could have three days off in a row, the detachment supervisor was able to do that, and it worked out pretty well for everybody involved. It wasn't something that a supervisor could initiate,

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but the trooper could so initiate it.

Well, he complained that this was happening and that the employees weren't getting paid overtime for their sixth day in the week, even though it was their request to work it. Well, I had a trooper, after this happened, a couple months later, ask to do this, and I said, you can't do that any longer because Jim O'Neill filed a complaint about that happening throughout the patrol.

Q. Okay. I asked you what you believed your probable cause to be when you arrested Mr. Alford, and I think I interrupted. Had you finished describing what that was?

A. I don't recall whether I finished or not. But the probable cause, which is facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed, is what probable cause is, and when I saw the recorder in the record mode and saw that it was moving, I felt that I had probable cause to arrest Mr. Alford in violation of the statute – as he was in violation of the statute.

Q. Okay. Was that based on anything other than that?

A. The prior training and knowledge of the statute.

Q. Okay. What did you do after Trooper Haner removed Mr. Alford from the vehicle?

A. As he was removing him from the vehicle, I said to Trooper Haner to kind of, for emphasis – I knew he would do it, but for a little added emphasis – "Pat him down." So that it would

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kind of spark his attention that I wanted him to be checked very, very carefully. Sometimes you get into a habit of you just kind of pat them down because you think it's okay, and almost always it is. But I wanted him to make sure that he made sure that he didn't have any weapons.

Q. Why did you think that the situation called for extra emphasis?

A. Just as an officer safety thing to protect ourselves so that we didn't get hurt.

Q. Okay. Then what happened?

A. As Trooper Haner and Mr. Alford were walking to the back of the car, I was retrieving the recorder and played it back, and I could hear Mr. Alford saying something but I didn't hear exactly what he said. I then walked to the rear of the vehicle and again told him that he was under arrest for violation of the statute. Making an illegal tape recording.

Q. Excuse me?

A. Making an illegal tape recording.

Q. Why did you tell him again?

A. In order for someone to be under arrest, they have to understand that they are under arrest, otherwise the arrest is not complete. You have to inform them and be sure that they understand that they are under arrest.

Q. Were you feeling any animosity toward Mr. Alford?

A. Absolutely not. I had never seen him before and didn't know

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anything about him.

Q. What happened when you were behind the car with Mr. Alford and Trooper Haner?

A. At some point Trooper Haner handcuffed him, and then I went back up to the vehicle to search the vehicle.

Q. Did you hear Mr. Alford make any statements regarding the legality of the recording?

A. He said something to the effect that it was legal for him to do it.

Q. Did you hear him say anything about a case?

A. I did not specifically hear him say something about a case. As he was walking to the back, I heard him saying something.

Q. What do you mean "something"?

A. I could hear that he was saying something to Trooper Haner, but as the traffic was going by and I was on the other side of the car, I didn't hear exactly what he said.

Q. You filed a report of investigation in this case, is that right?

A. Yes, I did.

MR. MENTZER: Your Honor, may I approach the witness?

Q. (By Mr. Mentzer) I'm handing you what's been marked, but I don't believe has yet been admitted, as Plaintiff's Exhibit No. 5. Do you recognize that document?

A. Yes, I do.

Q. I would like to refer you to the last page, page 3.

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A. Page 2, basically –

Q. Page 2, excuse me. The last page.

A. Okay.

Q. Now, looking in your narrative there, you mention State of Washington v. Florez, is that right?

A. Yes, I did.

Q. Now, you just told us that you didn't hear him say anything about a case.

A. That's correct.

Q. Why is that in your report?

A. I knew that he was saying something, and I didn't know exactly what it was, so I completed this report the next day because that night I had to go to a serious accident. Trooper Haner was at the jail. I was the only one out working at the time, so in the south part of our county I had to go to this accident, so I didn't write my report that night. I wrote it the next day at 2:55 p.m. As I was typing my report, I remember Mr. Alford saying something as he was going to the back of the car, and I looked at Trooper Haner's report to see exactly what he had said. And in my report I indicate that Alford said something to the effect that it was not illegal because of State of Washington v. Florez.

Q. And you received that information from where?

A. Trooper Haner's report, the name of what he said.

Q. If you didn't hear it, why did you put it in your report?

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A. If Mr. Alford had said it, this report is not only for my information, it is so Mr. Alford could put on an affirmative defense. And prior to someone going to court, they have what's called discovery, where all parties have access to the information. Therefore, in order for Mr. Alford's attorney, if he had one, to put on an affirmative defense, he would need information like that. This is a report to bring forward facts and information that you acquire, not just facts that you think can convict a person.

Q. Do you see it as your job to help the defendant?

A. Absolutely.

Q. How so?

A. As I say, our job is to collect the facts. If we have reason to believe that someone has committed a crime in violation of the laws of the state, that person is arrested or issued a ticket, or whichever it may be, but you need to bring forward the facts. If you stop someone for speeding and they say their speedometer doesn't work, that's an important fact that you would want to allow the person that hears the case that information. So if I was doing 65 in a 55 or 68, or whatever it might be, and the person said, my speedometer doesn't work, I didn't have any other cars to follow so that I could judge my speed, that would be an important fact that you would want to include.

Q. What did you do after Trooper Haner had handcuffed Mr.

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Alford?

A. As I indicated, I went back up to the car and started searching the vehicle incident to arrest.

Q. What were you looking for?

A. I wanted to find the activation for the wig-wag headlights and also wanted to make sure there were no weapons in the car.

Q. Did you find an activation for the wig-wag headlights?

A. Yes, I did. It was located just right by the steering column on the bottom of the dash. It was, as I recall, a white or beige rocker-type switch.

Q. And did you try that switch?

A. Yes, I did. I turned the switch on, and I could see through the front of the vehicle through the windshield that the headlights were flashing in an alternating manner.

Q. Was Trooper Haner present at that point?

A. He subsequently arrived back up after he had placed Mr. Alford in his car.

Q. Okay. And what did you do next?

A. I continued checking the contents of the vehicle, including the glove compartment in the back seat. I was familiar with a situation several years ago where a trooper had inventoried – because of a friend of mine who owns a tow company – a trooper had inventoried a car and had actually missed a large amount of cash in the glove box,

and the next day the person went to the tow company and said, "I would like to have my money out of the

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glove box." And my friend, the tow company owner, looked at the inventory sheet and said, "Sir, there's no money in the car." And naturally, you know, these two people are going, hold it a second. The tow company operating is saying, well, this guy is saying there's money in the car, I have no reason to disbelieve him. The inventory sheet doesn't show any money in the car. And so they went out and looked in the car, and in an envelope in the glove box there was a large amount of cash. The trooper hadn't seen it. If somebody had broken into the impound lot, which happens a great deal, and had found it in the car, the money would have been gone, and naturally the trooper would have been suspect or the tow driver.

Q. So how does that matter to the search here?

A. I think it's important that you look to make sure that there's nothing of value in a vehicle while you're inventorying it. It not only protects the person whose car it is, it protects me and it protects the tow operator.

Q. Okay. Were you looking at the paperwork inside the vehicle?

A. I looked at the paperwork inside the vehicle, yes.

Q. Did you find a case?

A. I did not find a case. I did see, again, his RCW book.

Q. Okay. You had looked at that prior, is that right?

A. Yes, I had. It was a miniaturized – the print wasn't miniature, but, I mean, it was basically an abridged version of

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the Revised Code of Washington Motor Code.

Q. The motor code?

A. Yes.

Q. What does that mean?

A. That's the laws that relate to the operation of vehicles in the state.

Q. Were the laws relating to the Privacy Act contained in that, that volume?

A. I don't believe they were.

Q. Okay.

A. That was Title 9, which is a separate section. I didn't search the book to see if they were in there, but I don't believe they were. I think it was just the motor code.

Q. Did you have Title 9 available to you at the scene.

A. Yes, I did.

Q. Did you look at it?

A. Yes, I did.

Q. Why did you look at it?

A. Just to make sure that I read the law properly, remembered the law properly as it related to making the recording.

Q. Did you make any telephone calls from the scene?

A. Yes, I did.

Q. Who did you call?

A. Initially I called the Kitsap County Sheriff's Department because Mr. Alford had made statements that, at least what I

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thought were about wig-wag headlights, saying that he was told up there that he could use them and that it was okay. So I attempted to contact someone up there and find out if they knew anything about him being told that he could use them.

Q. What did you learn there?

A. I talked to a sergeant who was at their Silverdale office and was told that he didn't know anything about a Mr. Alford.

Q. Okay. Well, you mentioned earlier that you were certain that the wig-wag headlights were not lawful. Why did you call Kitsap County?

A. To see if someone there knew that he – like I indicated before – that he had been told that it was okay to do that. I just wanted to make sure, if I could, at that time find out if someone had told him that he could.

Q. What difference would that make?

A. Well, it's kind of a bad thing if you get bad advice. But I truly felt in this situation that he had wig-wag headlights for a different reason than Department of Emergency Management.

Q. Did you make any other telephone calls?

A. Yes, I did.

Q. To whom?

A. I called a trooper who I felt would have the phone number for the deputy prosecutor that worked in the Pierce County District Court 2 in Gig Harbor.

Q. Did you not have that number yourself?

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A. I did not at the time.

Q. What do you mean at the time?

A. I made the phone call and got the phone number.

Q. And did you call that phone number?

A. Yes, I did.

Q. Who was the prosecutor you were trying to reach?

A. It was Deputy Prosecutor Mark Lindquist.

Q. Was he the on-call prosecutor?

A. I didn't have the on-call prosecutor list in my patrol car, but he was the prosecutor that we dealt with that would be handling this case.

Q. Okay. Did you call Mr. Lindquist?

A. Yes, I did.

Q. And what did you learn there?

A. I got an answering machine.

Q. Okay. And this is while Mr. Alford is still at the scene?

A. Yes, he was.

Q. Okay. Did you ever talk to Mr. Lindquist?

A. I subsequently did. I tried calling him back a few minutes later, and I got an answer.

Q. Okay. And where was Mr. Alford when you talked to Mr. Lindquist?

A. He was on his way to the Pierce County Jail. I had made the decision after reviewing the law again that, yes, in fact he had violated the law and felt that I was on firm footing as far as

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the arrest.

Q. Okay. Now, when you say "the law," what law did you mean?

A. The statute for tape-recording.

Q. And you believed that he had violated that, is that what you said?

A. That's correct.

Q. So what was the substance of your conversation with Mr. Lindquist?

A. I basically summarized the facts of the case and how I saw the tape recorder and read him the law. He probably didn't – at home, probably didn't have the statutes in front of him, so I read him the law.

Q. Okay. Now, did you mention to Mr. Lindquist that Mr. Alford had said something about the State of Washington v. Florez?

A. No, I did not.

Q. Why?

A. As I indicated, at the time I hadn't heard him actually say those words, but I told him that the defendant had said that it was okay to record. And then I, like I said, I read the statute to the deputy prosecutor.

Q. Do you ever encounter defendants saying what they are doing is lawful?

A. Very often.

Q. How so?

A. Well, as I indicated about the equipment type of things,

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they – oftentimes people think they are not violating the law. About at least every other drunk driver you arrest say they are not violating the law, that they are not affected, in that type of situation.

Q. Do they ever try to cite you to authority?

A. They will usually say that I know it's okay or I read that it was okay or my lawyer said it was okay.

Q. And what do you do with that information?

A. It would depend. If it was something you dealt with on a regular basis and knew exactly what it

was, you would say, well, yeah, I've heard that before, but if it's something you are not familiar with and don't do every day, you would want to make sure you're on firm ground.

Q. How do you do that?

A. By consulting with your local prosecutor.

Q. And in this case, that was Mark Lindquist, is that right?

A. That's correct.

Q. Okay. So what was – what happened after you read Mr. Lindquist the statute?

A. He said that he felt that it was a good arrest and that he was in direct violation of the law.

Q. What if he had told you it wasn't a good arrest? Mr. Alford is already on his way to jail, right?

A. I would have got on the horn and told Trooper Haner to bring him back, and we would have taken him to his car.

* * *

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rules and regulations of the State Patrol.

Q. Do you review troopers – with respect to your supervisory responsibilities, do you review trooper's determinations of probable cause?

A. At the end of every month, the troopers submit all their case reports and all their monthly documentation to the supervisor for review. I closely reviewed their case reports to make sure they were complete and well-written and

contained the facts and circumstances that were appropriate to the incident.

Q. After you had your telephone conversation with Mark Lindquist, what did you do?

A. I called Trooper Haner on the radio and told him that I had spoken with the prosecutor and that he agreed that the arrest was a good, valid arrest.

Q. Did you discuss any other matters on the telephone with Mr. Lindquist?

A. I don't recall specifically.

Q. Any matters relating – any other matters than the Privacy Act, is what I mean. Other possible charges.

A. As I recall, Mr. Lindquist said, "Well, it sounds like, based on the runaround the guy gave you, that you should charge him with obstructing." There's a statute for obstructing a public servant, which I can't quote the statute exactly, but if someone delays your investigation based on them not giving you proper information, that that's against the law.

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Now, a defendant doesn't have to make a statement, but if they are making statements to you that cause you to basically chase your tail, that's illegal, according to the statute. And he brought that up, and I said the State Patrol doesn't stack charges, which they don't.

Q. What does that mean?

A. That if you arrest someone for one reason, if there are other types of things – like I will resort back to a drunk driving case. If you stop and alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation.

Q. Have you ever arrested somebody for one crime and they've been charged with a different one later?

MR. PHILLIPS: Object to relevance on this.

THE COURT: Sustained.

Q. (By Mr. Mentzer) Why did you call Mark Lindquist instead of the on-call prosecutor?

A. Mr. Lindquist was the prosecutor that worked at the district court in Gig Harbor, which was the court that we worked out of. I had worked with him on several prior cases, and in my, at that time – what, 18 or 19 years? – 18 or 19 years of experience at that time, he was the best prosecutor that I had ever worked with, and I have worked with many, many prosecutors.

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Q. (By Mr. Phillips) Why did you leave the State Patrol then?

A. I'm an airline transport pilot, and I pursued to become a paid pilot, not a private pilot.

Q. It didn't have anything to do with the reprimand you received?

MR. MENTZER: Objection, Your Honor.

THE COURT: Sustained.

A. Absolutely not.

THE COURT: Disregard that answer. I sustained the objection.

Q. (By Mr. Phillips) Now, how many arrests have you made over the years, if you could give us an approximation?

A. I couldn't even give an approximation that would be close.

Q. Hundreds?

A. Yes, hundreds.

Q. How many times have you testified?

A. Not hundreds, but several.

Q. Dozens?

A. Dozens would be a fair assessment.

Q. Now, you were talking earlier about the Privacy Act, and isn't it actually correct that the Privacy Act prohibits recording a private conversation?

A. Yes, the statute says a private conversation.

Q. It doesn't prohibit reporting any conversation, but a private conversation.

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A. I would have to review the statute.

Q. Well, you just said, you just agreed that it's a private conversation.

A. It does say that, but I don't know if it says other additional conversations.

Q. Did you review the statute at that time?

A. Yes.

Q. Was the phrase "private conversation" in there that night?

A. Yes, sir, it was.

Q. Now, do you still have a copy of Plaintiff's Exhibit 5 in front of you, your report of investigation?

A. Yes, I do.

Q. Now –

THE COURT: Wait a minute. It's not in evidence, counsel.

MR. PHILLIPS: I will place Exhibit 5 into evidence.

MR. MENTZER: No objection. I'm wondering, though, if I could retrieve my copy from the defendant and have the –

THE COURT: Sure.

MR. MENTZER: -- defendant's copy.

THE COURT: Exhibit 5 may be admitted.

(Exhibit No. 5 was admitted.)

Q. (By Mr. Phillips) Now, on the first page, you will notice where I've highlighted. Is that your signature?

A. Yes.

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Q. What is the certification above that?

A. "I certify (declare) under penalty of perjury under the laws of the State of Washington that the attached reports are true, correct, and accurate."

Q. Let's turn to the first narrative. You see the first section that I have highlighted. You identify there that Trooper Haner told you that the subject had left.

A. Yes.

Q. Okay. Then you say, "He also said." When you say "he," who are you referring to?

A. Trooper Haner.

Q. Okay. And then, "Haner said the subject could not get," and Haner said, that's what Haner told you?

A. Correct.

Q. You're relating there what Trooper Haner told you.

A. Yes.

Q. Now, in the next paragraph, you say that "I checked the RCW." You did that yourself, you checked the RCW?

A. Yes.

Q. You didn't have Haner do it –

A. No.

Q. – you did it?

A. I did it.

Q. Because if you had Haner do it, you would have written in the report, "I had Haner check the RCW."

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A. Or that the RCW was checked.

Q. Now, in this paragraph, can you tell me in there, is there anything that Mr. Alford refused to do?

A. He refused to turn his wig-wag headlights on with the switch that I subsequently found.

Q. Did you ask him – did you see the switch?

A. I did not see the switch.

Q. Did you ask him if there were any switches?

A. I did not ask him, but had asked him to turn the wig-wag headlights on.

Q. Did he punch every button that you asked him to punch?

A. I didn't ask him to punch a specific button. As I recall, he was manipulating like a key fob alarm-type thing.

Q. Have you ever had a car alarm?

A. Yes.

Q. Do you activate it with a key fob alarm-type thing?

A. Yes. In fact, I've had two car alarms.

Q. Okay.

A. Both of them were with the key activated.

Q. Did he pull out the operator's manual?

A. Yes, he did.

Q. Did he show it to you?

A. I don't remember that he specifically showed it to me, but I specifically remember him going through it.

Q. Did he try and hide it from you?

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A. No, sir, he didn't.

Q. Did he open the hood when you asked him to?

A. Yes, he did.

Q. Did he object at all to looking around under the hood?

A. No, he didn't.

Q. Now, on the last page, you talk about his intent to clandestinely record the conversation. You stated on direct examination that what really got you was the fact that you felt he was trying to hide the tape recorder, is that right?

A. That's why I said clandestinely.

Q. But what really made you arrest him was the fact that you felt that it was being hidden from you, right?

A. He was clandestinely recording the conversation.

Q. Okay, now answer the question. What made you arrest him was the fact that he had it hidden, not the fact that he was recording, isn't that right?

A. That's correct.

Q. So you –

A. That's why I said clandestinely.

Q. So you were irritated that you thought he was trying to hide the recording.

A. I wasn't irritated at all.

Q. But if he had it out in the open, you said you wouldn't have arrested him.

A. Just because you arrest somebody doesn't mean you're

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irritated with him. He didn't violate me, he violated the statute to the State of Washington. Just like the speeder violates the law –

MR. PHILLIPS: I will object as nonresponsive.

THE COURT: Sustained. Go ahead.

Q. (By Mr. Phillips) Now, actually, the charge was dismissed, wasn't it?

A. Yes, it was.

Q. So he didn't violate the statutes of the law of Washington, did he?

A. In my opinion, he did.

Q. So it's still your opinion that he violated those statutes?

A. At the time that the case was dismissed, it was clearly my opinion that he had violated the statute. There was a new prosecutor that wasn't

familiar with the case that subsequently dismissed it.

Q. Well, would you like me to bring out the exhibit where it was actually dismissed by the court and not by the prosecutor?

A. Please.

MR. PHILLIPS: It's Exhibit 3, I believe.

Q. (By Mr. Phillips) Look at page 2 of that where it says "Court Order."

THE COURT: Exhibit number?

MR. PHILLIPS: Exhibit No. 3.

A. Page 1 says "Court Order."

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Q. (By Mr. Phillips) And the second page also.

A. Okay.

Q. Now, can you tell me on there where it says that it was dismissed by a prosecutor?

A. The prosecutor would have, along with the defense, after they had a consultation, agreed to have the charge dismissed. But in order for that to happen, the judge would dismiss it.

Q. Oh, okay. So a minute ago the prosecutor dismissed it, but now that you see the court order, the judge dismissed it, is that right?

A. No, sir.

Q. Okay.

A. The judge ultimately would dismiss it.

Q. Do you know how many hearings they had in this case?

A. No, I do not.

Q. You're not aware that this actually went to a contested hearing?

A. It wouldn't go to a contested hearing because it's a criminal matter. An infraction, the wig-wag headlights, would go to a contested hearing. The criminal matter of the recording would go to a trial before a judge or a judge and a jury.

Q. Who was the victim in this case?

A. Basically, the State of Washington.

Q. No, who were the victims in this case?

A. Who was illegally recorded?

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Q. No. No one was illegally recorded. Who were listed as victims in this case?

A. Myself and Trooper Haner.

Q. And you felt victimized?

A. I didn't feel victimized, but I felt we were the subjects that were violated.

Q. So your rights were violated by him clandestinely recording you.

A. I felt that he had violated the statute that prohibited that.

Q. Now, you testified that you've pulled over drunks before.

A. Yes, sir.

Q. And what sort of things, as with Officer Haner, what sorts of things go into establishing probable cause to arrest a drunk driver?

A. Facts and circumstances that would lead a reasonable and prudent person to believe that a crime had been or was being committed.

Q. What sort of facts would those entail?

A. The precontact driving, whether they were weaving, speeding. It actually can be something as small as a taillight violation that you contact a person for.

Q. Now, Trooper Haner mentioned slurred speech. Is that another indicator that's used?

A. It can be, but when I would indicate that, I would say I

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felt the person's speech was slurred. However, I had never spoke to the person before. But I think we've all probably heard people who have had too much to drink and you can detect a slur in their speech that's not what would be a normal speech impediment.

Q. And what's the punishment for drunk driving, do you know?

A. Not right off the top of my head.

Q. Is there a standard punishment for gross misdemeanors?

A. I think there's a penalty range, but I'm not sure exactly what it is. In the code book it's – which is the RCW code book – it specifically says some

things about driving under the influence and lists them out, but they are not always followed. As far as I know.

Q. Is there a possibility of jail time for a gross misdemeanor?

A. Yes, sir, there is.

Q. Significant jail time?

A. Yes, sir, there is.

Q. A year?

A. As I recall, I think a gross misdemeanor is up to one year in the county jail. I would have to look, but I believe it's up to one year in the county jail, and not to exceed one year.

Q. Now, you were the supervisor on the scene.

A. Yes.

Q. You were in charge.

A. Yes.

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Q. What you said went.

A. Basically.

Q. So when you told Trooper Haner, "Put him under arrest," that was what was going to happen.

A. If Trooper Haner, as he testified, felt that what I was saying wasn't proper, he would have kick [sic] me in the shin and said, "Hold it a second. I think we should talk about this."

Q. What time was Mr. Alford placed into custody?

A. At approximately 8:10.

Q. Now, turning back to Exhibit 5 here.

A. Which one is it? Okay.

Q. That's your report of investigation. You say, you wrote in your report, "Alford said something to the effect that it was not illegal because of State of Washington v. Florez. He went on to say that it was not in violation of 9.73.030. I advised him that it was a violation of subsection 3 and that he had not made an announcement or obtained my permission."

Is that an accurate rendition of what happened that night?

A. He didn't recite the statute. He basically said it wasn't against the law.

Q. Okay.

A. You can see I don't have it in quotes there, "He went on to say."

Q. And Florez, Flora, Flores, whatever the name of the case was, wasn't exactly clear.

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A. I didn't hear him say it, no.

Q. You didn't [sic] him say anything?

A. I heard him talking to Trooper Haner as he was walking to the back of the vehicle, and I knew he was saying something, but I couldn't hear exactly what he was saying.

Q. But you put it in your report anyway.

A. Yes, I did.

Q. Out of solicitude for his possible defense attorney.

A. Because I knew he had said something, but I wasn't sure what he had said.

Q. You didn't think it was worth while to check up and see what he had said before you arrested him, before you transported him to jail?

A. I had arrested him at that point, and I didn't know exactly what he had said. I heard what he said while I was at the rear of the car, and I felt based on what I knew about the statute, that he was in violation of the law.

Q. Because you felt that this was a private conversation?

A. Yes, I did.

Q. Even though it's the type of conversation that you come into court and testify about.

A. At – at the defendants' request, yes.

Q. Oh, you've never come in and testified at the prosecution's request?

A. Any trial that I've ever testified at would have been at the

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arrest?

A. I think I indicated approximately 8:10. We could probably go back and find a little bit closer if we listen to the tape and heard the radio transmissions off of Mr. Alford's radio, when they would give the time, and then we could maybe get a correlation as to when you hear me say on the tape that you're under arrest.

Q. But you reckon it's around 8:10?

A. You know, you arrest somebody, you look at your watch, you go "about 8:10." We're not using the atomic clock.

Q. Now, you said that you didn't have any animosity toward Mr. Alford. So what was the purpose of this comment, "I haven't started to chew your ass yet"?

A. He said that I was chewing his ass, and it – if I had been chewing his ass, there would have been no question about it.

Q. Sort of like when he was under arrest, there was no question that he was under arrest?

A. Right.

Q. Because he was under arrest as soon as he got out of that car, wasn't he?

A. As I indicated, I think I placed him under arrest while he was still in the car. My first statement was, "You're under arrest," if I remember, "for illegal recording," and I think I said, "Do [sic] understand?"

Q. Now, you were standing on the passenger side. You say you

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were standing on the passenger side and you looked in and you saw the tape recorder, and you saw the play and record buttons were pushed, correct?

A. After the jacket had been removed off the recorder where it was secreted.

Q. Okay. So when you were looking and you saw something dark and shiny, you thought it was a gun or a weapon, that's not when you saw the play and record buttons pushed down?

A. My attention was immediately directed to this black, shiny item that was underneath the coat, partially dislodged now, and then I recognized what it was.

Q. So it didn't take you long at all to figure out it was not a weapon.

A. It – my senses were heightened to an extreme level when I saw the black, shiny thing, and I directed my attention on it while still keeping him in my peripheral vision, looking down, and then saw what it was.

Q. Mmm. Did you ever ask him if he had accidently [sic] pushed those buttons?

A. No, I did not.

Q. You had absolutely no problem being recorded during that traffic stop?

A. Not if the recorder is in the open, none at all.

Q. You dealt with law enforcement recordings while you were in the narcotics division, correct?

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A. I never made any, no.

Q. Were you aware of how they were done?

A. Yes.

Q. And there was a procedure to get – is there a procedure to get court approval before you make one of those recordings?

A. At that time it was different than it is today. Today it requires supervisory approval of a certain level of supervisor, and it has to be written down, recorded, and maintained for so long, and it's only good for so long. I don't remember exactly what it is. But it's different now than what it was then. In those days you had to get a court order. I don't want to say the old days.

Q. It's okay. You put in 20 years, you're entitled. Now, what are the WSP regulations on when you are supposed to affect an arrest, or when you are authorized to affect an arrest?

A. When you have probable cause.

Q. And probable cause is defined as?

A. Facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed or actually is about to be committed.

Q. Have you ever claimed in this case that you consulted with the attorney prior to arresting Mr. Alford?

A. You know, I think there, on this deal here, it's a little bit of a – I suppose a technical misstatement, because it says

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other person around was Trooper Haner. There was nobody else around. Nobody that could hear us if we were screaming, and that it was a private conversation.

Q. You made the decision?

A. I did, yes. When I observed the tape recorder.

Q. And you stand by that?

A. Yes, I absolutely do.

MR. PHILLIPS: I have nothing else for you.

MR. MENTZER: I have no questions, Your Honor.

THE COURT: Detective, you may step down.

(Witness excused.)

THE COURT: Ladies and gentlemen, I understand our next witness we have scheduled for 1:30, so I'm going to ask you to come back at 1:30. That will give you a long lunch. I'm trying very hard to get jury instructions ready for you, and we won't waste that time because that has to be done before we can submit the case to you anyway. We're still trying to finish this today, although it is doubtful that we will be able to do that, but we are going to keep trying.

So take a long lunch, follow my instructions about recesses, and go your own way and do what you want to do, but come back ready to go to work at 1:30. I will know more then about how we are going to proceed. I try not to keep you around here waiting if I – you know, if it's going to be a waste of your time. So, go shopping.

* * *

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Q. Okay. Do you remember whether you received a call from Sergeant Devenpeck on November 22nd, 1997?

A. I did, yes.

Q. That call involved Mr. Alford?

A. Correct.

Q. Okay. What information did Sergeant Devenpeck relate to you during that telephone conversation?

A. It was my understanding that – it happened in the evening. I was home. What I recall is they had a suspect, I believe – it was Trooper Haner and Sergeant Devenpeck; there may have been

another trooper – but as I recall, there was a suspect who had pulled in behind a disabled vehicle and had done so with flashing wig-wag lights in a way that could be interpreted he was impersonating a police car. It's also, if I recall correctly, there may have been some question in the mind of the motorists in the disabled vehicle as to whether or not an officer had just pulled up behind him. Apparently then a real trooper came pulling in sometime after the suspect, Mr. Alford, and as I understand it, the motorist asked some questions about whether or not the first person who pulled in behind him was an officer.

He advised me that the trooper, I believe it was Trooper Haner, after learning this from the motorist, the disabled motorist, that he had gone off and – excuse my voice, I've been at the dentist so my voice is a little dry.

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It was my understanding – excuse me – that Trooper Haner then went and stopped the car that had pulled in behind the disabled vehicle, the car that allegedly had these wig-wag lights. And when he pulled over that person, he found handcuffs in the car, a police scanner in the car, and that that individual, the suspect, Mr. Alford, was either evasive or lying about the wig-wag lights. Apparently Trooper Haner had great difficulty getting the suspect to admit that he had wig-wag lights, and then, as I recall, it was something to the effect the suspect, once it was determined that, yes, in fact there were wig-wag

lights, as I recall, the suspect said he didn't know how to use them, or something to that effect.

Those were the facts as I recall, and again I don't recall which encounters were specifically between Trooper Haner and the suspect and Sergeant Devenpeck and the suspect. I just remember the big picture and those facts.

And the other fact I remember being told is that when Sergeant Devenpeck was talking to the suspect, he looked over and saw a tape recorder somewhat hidden, and the suspect had furtively, without his consent, knowledge, or permission, recording him.

Q. Did you discuss any of the applicable laws with Sergeant Devenpeck at that point?

A. Yes, we did.

Q. What laws did you discuss?

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A. The main discussion centered around the Privacy Act, and that is Washington State's Privacy Act regarding recording of another person. I believe we also discussed possible impersonation of an officer charge here and possible false representation to an officer.

Q. What was your impression of the timing of this call in relation to the arrest?

A. You know, I'm not exactly sure. I know it was at home and it was in the evening. I do not know the exact times. I understand there may be phone records, but I have not reviewed the phone records.

You mean the time in relation to what was going on between the suspect and the troopers?

Q. Exactly, yes.

A. It was my understanding that this call was coming to me from the scene.

Q. And you were at home, weren't you?

A. Yes.

Q. Did you have a copy of the Privacy Act at home?

A. No, I don't have – I'm not online with cases at home. However, most of the issues I deal with in DUI, I deal with so much that I usually know the applicable law. For example, I have many times dealt with false representations to an officer. That comes up a lot and I was up to speed on that case law. It's not unusual for suspects to give false information to

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officers.

The other issue that was potentially there was criminal impersonation, that is someone impersonating a police officer. I had dealt with that issue a lot less, but I had seen it before.

The other issue, which is the violation of the Privacy Act, that is the one and only time that I've dealt with that issue, violation of the Privacy Act. But as I recall, Sergeant Devenpeck – and I expressed to Devenpeck that I didn't know the law that well in that area, and he read me the statute over the phone, is my recollection.

Q. And what were you attempting to do at this point?

A. What you're always attempting to do in a situation like that, you look at the big picture, all of the facts that are available to you, and take into account the law and decide if there's probable cause. Much later in the process, I'll make a determination of whether or not to charge and whether or not it's something I can prove in court beyond a reasonable doubt. The standard – probable cause is a much, much lower standard than proof beyond a reasonable double [sic]. Probable cause is just a reasonable suspicion that a crime has been committed.

So that's what I'm looking for at this point, but I'm also starting to think forward to how will I deal with this later, what will I charge later? As I expressed before, you, as a prosecutor, will often end up charging something different than

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what the officers arrested the individual for.

So I'm looking at the facts, all of the facts, looking for possible charges, and looking for probable cause.

Q. Did you make a determination of probable cause here?

A. Yes, I did.

Q. What was that determination?

A. I advised Sergeant Devenpeck there was clearly probable cause.

Q. Okay. And what was that determination based on exactly?

A. All the things that I just listed, the big pictures. All the facts. I considered the fact that he had wig-wag lights. I considered the fact that he pulled in behind a disabled motorist using those wig-wag lights in a way that the motorist might have interpreted him to be a police officer. I looked at the fact there were handcuffs and a police scanner in the vehicle. I also put a lot of weight on the fact that the defendant was evasive and not honest about those wig-wag lights, and I looked at the fact that that tape recorder was hidden.

Q. Were you familiar at that time with a case called Florez, State of Washington v. Florez?

A. On that evening, no, I was not.

Q. Were you familiar with any cases involving the Privacy Act at that point?

A. No, I had not dealt with that issue before.

Q. Did Sergeant Devenpeck mention the case of State v. Florez.

* * *

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MR. PHILLIPS: Not from plaintiff, Your Honor.

MR. MENTZER: I have one.

THE COURT: Yes.

MR. MENTZER: the same one I made in chambers. I haven't yet numbered them. I will try to figure out which one it is.

14, if that is the one, Your Honor. It says, "It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not private under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of State of Washington v. Flora."

We take exception to that instruction with all due respect to the court. We know that was the ruling on our motion for summary judgment, but we believe the Washington Supreme Court in State v. Clark, 129 Wn.2d 211, is dispositive and determinative of that factor. And the critical factor, we believe, is that there were passersby present, and that is what made the difference in Flora. In this case there were no passersby, and thus we believe that the State v. Clark stands for the proposition that the conversation was private and thus not lawful to record under the Privacy Act.

THE COURT: I appreciate your argument. It is my judgment, as I guess I'm not sure I have said on the record, but

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it's my judgment that the language of the Privacy Act itself requires that a conversation be private before there is a prohibition on one-party-consent recording. It seems to me ultimately clear and

plain on the face of the statute, and also in the law that has interpreted it, that when a police officer is making a stop on a public highway that that is not a private conversation. Among other reasons is that everything that is said there is a matter of public interest and public inquiry, including in-court inquiry. There's nothing that can be said, in my view, by either – and this goes beyond this case, but I think there's nothing said under such circumstances by the one stopped or by the police officers that they can reasonably expect will be held private. It's a public officer doing public business with a citizen who is a member of the public, and the citizen should know from the circumstances, as the officers should know from the circumstances, that the conversations would not be expected to be private. Certainly they would claim it wasn't private if there's a confession on the spot.

So, in any event, that's my view of that issue.

Okay. Are we ready to instruct the jury then?

MR. PHILLIPS: Yes, Your Honor.

MR. MENTZER: Yes, Your Honor.

THE COURT: All right.

(Jury present.)

THE COURT: Ladies and gentlemen, you heard before the

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last long recess here that both parties have rested, meaning they have presented all the

evidence that they choose to present in the case, and so it is now time to instruct you on the law.

I told you earlier that you would be allowed to take notes during the presentation of evidence, but not at any other time. So now is the time for you to put your notes away. The only time you have taken notes is when there has been evidence presented to you, and I will ask you to not take further notes. You will be allowed to take those notebooks into the jury room with you.

I do want to just take a second to explain this process.

Jean is going to hand you copies of the instructions and verdict forms. I am going to read the instructions to you. You can read along with me, if you wish, or just listen. Some people have better comprehension if they read along with a speaker; others find it better to just listen. Either way, it's up to you.

Those copies of the instructions are work copies for you and you can taken those into the jury room with you. The original instructions that I read from and that bear my original signature are the instructions that will control your deliberations. If there are any differences between the original instructions and your copies, it's the original ones that control.

Now, I have already, in order to save time in typing, have

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made some interlineations in these instructions. I've just stricken some words out and initialed in

the margin. The only reason for that is to save time. Any parts that I have stricken out are not part of the instructions. You are to disregard that.

Also you should be aware that sometimes when I read instructions I find typographical errors that I overlooked before or something is wrong. If I do make any changes here in court that are not in your copies, I will let you know what they are as we go along.

But with that introduction, I will instruct you on the law.

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took and oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally

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important. You must not read into these instructions or into anything the court may have

said or done any suggestion as to what verdict you should return – that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consist of: The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; and the exhibits which have been received into evidence.

Evidence may be direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, and interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and

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weight.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing argument, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you

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find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

The plaintiff has two claims: One is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;

2. The defendant acted under color of law; and

3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of

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proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendants' acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the

burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

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Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

In pertinent part, the Washington State Privacy Act, RCW 9.73.030, provides: " . . . It shall be unlawful for any individual . . . to record any . . . private conversation, by any device . . .without first obtaining the consent of all the persons engaged in the conversation.

And further, section 3, Where consent of all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such

communication or conversation is about to be recorded or transmitted; provided, that if the conversation is to be recorded that said announcement shall also be recorded.

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Violation of the Privacy Act is a gross misdemeanor.

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of State of Washington v. Flora.

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

It is the duty of the court to instruct you on the measure of damages. By instructing – and I see a typographical error there I'm going to interline. The word "instruction" in the instruction on line 3 should be "instructing." Let me start

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again.

It is the duty of the court to instruct you on the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and

it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

If you find that before this occurrence the plaintiff had a preexisting condition which made him more subject to injury than

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a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the preexisting condition had there been no occurrence as complained of in this case.

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply

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because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do no change an honest belief about the weight and effect of the evidence simply to reach a verdict.

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

Now attached you will see work copies of the verdict forms. You will only use one verdict form in this case. Use verdict form A if you find for the plaintiff and against either or both defendants on either or both of plaintiff's claims. And if you use verdict form A, you will fill in that "We, the jury, find for the plaintiff and against defendants," and write in the name of any defendant that you find against, "and find plaintiff's damages to be," and there you would write in a number as indicated.

If you find for defendants and against plaintiff, you will use verdict form B only, and it simply

reads, "We, the jury, find for both defendants and against plaintiff."

Now, let me say a couple of other things before we turn to argument.

There's a buzzer in the jury room that buzzes into chambers, so that after you start to deliberate on the case you should not

* * *

Instruction No. 1

Members of the jury, now that you have heard all the evidence ~~and the arguments of the attorneys~~[RJB], it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return–that is a matter entirely up to you.

Instruction No. 2

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; *and* [handwritten]
2. the exhibits which have been received into evidence; ~~and~~
3. ~~any facts to which all the lawyers have agreed or stipulated~~. RJB

Instruction No. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other

Instruction No. 4

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the

witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Instruction No. 5

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

2.[sic] Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence

and must not be considered. ~~[In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.]~~ RJB

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Instruction No. 6

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Instruction No. 7

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Instruction No. 8

Plaintiff has two claims: one is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

Instruction No. 9

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

Instruction No. 10

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;
2. The defendant acted under color of law; and
3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for

investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendant's acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff were lawful, and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

Instruction No. 11

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

Instruction No. 12

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

Instruction No. 13

In pertinent part, the Washington State Privacy Act, RCW 9.73.030, provides:

> . . . it shall be unlawful for any individual . . . to record any . . . private conversation, by any devise . . . without first obtaining the consent of all the persons engaged in the conversation.
>
> * * *
>
> (3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in

the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: *Provided,* That if the conversation is to be recorded that said announcement shall also be recorded.

Violation of the privacy Act is a gross misdemeanor.

Instruction No. 14

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts on 1992 in the case of *State of Washington v. Flora.*

Instruction No. 15

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

Instruction No. 16

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articuable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

Instruction No. 17

It is the duty of the court to instruct you on the measure of damages. By ~~instruction~~ *instructing* [handwritten] you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of necessary medical care, treatment, and services received to the present time.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Instruction No. 18

If you find that before this occurrence the plaintiff had a pre-existing condition which made him more subject to injury than a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the pre-existing condition had there been no occurrence as complained of in this case.

Instruction No. 19

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Instruction No. 20

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Instruction No. 21

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. JOI HANER, and JANE DOE HANER, his wife; and GERALD DEVENPECK, and JANE DOE DEVENPECK, his wife, Defendants.	Case No. C99-5586RJB VERDICT FORM A

WE, the jury, find for plaintiff and against defendant(s) _____.
(Write in "Haner" and/or "Devenpeck")

and find plaintiff's damages to be $_____.

DATED this ____ day of January, 2001

_____
FOREPERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. JOI HANER, and JANE DOE HANER, his wife; and GERALD DEVENPECK, and JANE DOE DEVENPECK, his wife, Defendants.	Case No. C99-5586RJB VERDICT FORM B

WE, the jury, find for both defendants and against plaintiff.

DATED this 5th day of January, 2001

/s/ George W. Heck
FOREPERSON

(8)

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

NO. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Under the Fourth Amendment's "objective reasonableness" test, an arrest is deemed "reasonable" if, based on an objective assessment of the facts and circumstances at the time of arrest, there is probable cause to believe that a violation of law has occurred.

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For purposes of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the "closely related offense doctrine," the Ninth Circuit had no controlling authority applying the doctrine and Washington state law did not apply the doctrine?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Alford v. Haner,* 333 F.3d 972 (2003). Pet. 1a-22a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. Pet. 23a. The order of the United States District Court for the Western District of Washington granting in part and denying in part Defendants' Motion for Summary Judgment is also unpublished. Pet. 28a-41a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 23, 2003. Pet. 1a-22a. On August 8, 2003, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. Pet. 23a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Other relevant statutes are set out in the Petition. These include Washington's Privacy Act prohibition against recording a private conversation, Wash. Rev. Code § 9.73.030; (Pet. 66a-68a);

Washington's prohibition against impersonating a law enforcement officer, Wash. Rev. Code § 9A.60.040(3); (Pet. 68a-69a); and Washington's prohibition against obstructing a law enforcement officer, Wash. Rev. Code § 9A.76.020 (Pet. 69a).

STATEMENT

The Court consistently applies the "objective reasonableness" test in evaluating whether an arrest is supported by probable cause. Under this test, probable cause exists if "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense (the "objective reasonableness" test). *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The principal question in this case is whether the "objective reasonableness" test is inapplicable where there is probable cause to arrest, but the arresting officer articulates an offense for which probable cause does not exist, and the articulated offense is not closely related to an offense for which probable cause does exist.

The Ninth Circuit concluded that the "objective reasonableness" test was inapplicable under these circumstances, applying instead the "closely related offense doctrine". Only if the Court determines that the Ninth Circuit was correct, need it reach the secondary question of whether the Petitioners are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001).

A. Factual Background

1. Events Establishing Probable Cause To Arrest Mr. Alford For The Offense Of Impersonating An Officer

On November 22, 1997, Mr. Alford pulled behind a disabled vehicle on a dark and rural section of State Route 16, utilizing wig-wag headlights that he had installed on his vehicle. J.A. 94-99. Wig-wag headlights flash on and off in alternating fashion, and are customary on law enforcement vehicles. Washington State Patrol Trooper Joi Haner was driving the opposite direction and observed Mr. Alford's car pull in behind the disabled car. Trooper Haner wanted to see if the motorists needed assistance, so he turned around at his first opportunity and came back, pulling in behind Mr. Alford's vehicle. J.A. 94-95. As Trooper Haner approached the disabled vehicle, Mr. Alford left in a hurry. J.A. 95. Trooper Haner found Mr. Alford's urgency to leave the area unusual. In the Trooper's experience, a person who stops to help a disabled car normally will stay to talk with the trooper as the trooper contacts the persons in the disabled vehicle. J.A. 95.

Upon contacting the two motorists at the disabled vehicle, one inquired of Trooper Haner whether Mr. Alford was a cop. J.A. 96-97. Now curious, Trooper Haner inquired why they had formed that belief and "they told [Trooper Haner] that [Mr. Alford] had wig-wag headlights, and they were under the impression that [Mr. Alford] was a police officer". J.A. 96. The stranded motorists

indicated to Trooper Haner, "Yeah, we thought he was a cop". *Id.*

Trooper Haner knew that persons successfully pretending to be law enforcement officers place themselves in a position to take advantage of vulnerable people. J.A. 100. Concerned that Mr. Alford was pretending to be a police officer, Trooper Haner contacted his supervisor, Sergeant Gerald Devenpeck. After making sure the two motorists were all right, Trooper Haner then pursued and stopped Mr. Alford. J.A. 97, 101. As Trooper Haner approached Mr. Alford's car, he noticed that the license plate had a tinted cover making it unreadable. J.A. 102. He then noted that Mr. Alford had a portable police scanner on the seat next to him. J.A. 104. This caused Trooper Haner concern because, "[t]he majority of people that [he] contacted who had hand held scanners are involved in some criminal activity". J.A. 104. Mr. Alford also had installed a radio tuned to the same frequency as Trooper Haner's. J.A. 103. The radio had a microphone that allowed Mr. Alford to broadcast and receive police communications. J.A. 104. Mr. Alford also indicated that he had handcuffs. Mr. Alford initially told Trooper Haner that "he worked for the State Patrol and then he changed it to Texas, and shipyard police". J.A. 105-06, 35.

These facts, along with Mr. Alford's evasiveness in responding to questions concerning his wig-wag headlights, led Trooper Haner to believe that he had probable cause to arrest Mr. Alford for the crime of impersonating a law enforcement officer. J.A. 104-07.

2. Events Establishing Probable Cause To Arrest Mr. Alford For The Offense Of Obstructing A Law Enforcement Officer

Shortly after Trooper Haner stopped Mr. Alford, Sergeant Devenpeck arrived and began questioning Mr. Alford about the existence of his wig-wag headlights. Sergeant Devenpeck characterized Mr. Alford as "talking in circles". J.A. 138. Initially, Mr. Alford told Sergeant Devenpeck that he had permission from Kitsap County to have wig-wag headlights and that "he could use them as long as he wasn't impersonating". J.A. 134. Sergeant Devenpeck knew this statement was contrary to the law. J.A. 134-35. A little while later Mr. Alford told Sergeant Devenpeck that the wig-wag headlights were part of his alarm system. J.A. 137-38. When asked to activate the wig-wag headlights, Mr. Alford pushed buttons on his keychain and his emergency flasher, none of which operated the wig-wag lights. All the while, Trooper Haner could see a switch prominently located on the steering column that Mr. Alford never pressed. J.A. 108-09. As it later turned out, that switch activated the wig-wag headlights. J.A. 149. These facts were presented to the jury and supported probable cause to arrest Mr. Alford for obstructing a law enforcement officer.

3. Events Leading To Mr. Alford's Arrest For The Offense Of Violating Washington's Privacy Act

During the course of questioning Mr. Alford about his wig-wag headlights, Sergeant Devenpeck noticed a shiny black object on the seat next to the

driver's seat. The object had previously been hidden under a jacket next to Mr. Alford. Sergeant Devenpeck looked to see if it was a weapon and then noticed that it was a tape recorder with the play and record buttons depressed and operating. He rewound the tape and could hear that both his voice and Mr. Alford's voice had been recorded.

Sergeant Devenpeck had been trained on the Privacy Act, Wash. Rev. Code § 9.73.030; Pet. 66a-68a. Believing he had probable cause, Sergeant Devenpeck arrested Mr. Alford for violating the Privacy Act. But he wanted to make sure he "remembered the law properly as it related to making the recording". J.A. 151-52. He reviewed language in the statute which makes it unlawful to "record any [p]rivate conversation . . . without first obtaining the consent of all of the persons engaged in the conversation". He then attempted to contact a prosecuting attorney to make sure he was "on firm ground". J.A. 155-56.

Initially, Sergeant Devenpeck was unable to reach Deputy Prosecuting Attorney Mark Lindquist. A few minutes later, while Trooper Haner was transporting Mr. Alford to jail, Sergeant Devenpeck was able to reach Deputy Prosecutor Lindquist by phone. The Sergeant and deputy prosecutor discussed the Privacy Act, impersonation of an officer (Wash. Rev. Code § 9A.60.040), Pet. 68a, and possible false representations to an officer – obstructing (Wash. Rev. Code § 9A.76.020). Pet. 69a; J.A. 177-78. Sergeant Devenpeck read the Privacy Act statute to the prosecutor over the phone. Pet. 8a, 18a. Deputy Prosecutor Lindquist believed that, considering the totality of the circumstances, the officers had

probable cause to arrest Mr. Alford, and he so testified at trial. J.A. 177-79.

Due to the Washington State Patrol's policy of not stacking charges, the officers arrested and charged Mr. Alford only with violating the Privacy Act. J.A. 157.[1] The Privacy Act charge was dismissed by the state District Court based on a decision of the Washington Court of Appeals holding that conversations between law enforcement officers and motorists on public highways are not "private" conversations for purposes of the Privacy Act. See, *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992) (recording an arrest made by public officers on a public thoroughfare near passersby did not violate the Act because the conversation was not private) Pet. 9a-10a.

B. Procedural History

Mr. Alford brought federal civil rights and state law claims against the two Troopers and the Washington State Patrol in the United States District Court for the Western District of Washington. Each of Mr. Alford's claims was based on an allegation that his arrest was without probable cause and therefore was unlawful. Pet. 8a.

Petitioners moved for summary judgment on two bases. First, Petitioners argued that the officers had probable cause to arrest Alford for violating the Privacy Act. In this respect, Petitioners urged that the circumstances surrounding the conversation in this case were sufficiently different from those in

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[1] Mr. Alford was also given a traffic infraction for the wig-wag headlights. *See* Wash. Rev. Code § 46.37.280(3). J.A. 24-25.

Flora, and rendered the conversation private and subject to the Privacy Act prohibition. Second, Petitioners argued that the officers were entitled to qualified immunity in any event.

The District Court denied Petitioners' motion for summary judgment, concluding that the facts of this case did not distinguish it from *Flora*. As to qualified immunity, the District Court determined that *Flora* had clearly established the inapplicability of the Privacy Act. Pet. 45a-46a. On the second prong of qualified immunity analysis, the District Court concluded that there was a question of fact for the jury whether the officers nonetheless reasonably believed they had probable cause to arrest Mr. Alford. J.A. 199-200.

The case then went to trial before a jury. During trial, the deputy prosecuting attorney testified that he had determined and advised the officers that probable cause existed not only for the Privacy Act violation, but also for impersonating an officer and obstructing a law enforcement officer. Specifically, at trial, Deputy Prosecuting Attorney Lindquist testified, without objection:

> Q Did you make a determination of probable cause here?
>
> A Yes, I did.
>
> Q What was that determination?
>
> A I advised Sergeant Devenpeck there was clearly probable cause.
>
> Q Okay. And what was that determination based on exactly?

> A All the things that I just listed, the big pictures. All the facts. I considered the fact that he had wig-wag lights. I considered the fact that he pulled in behind a disabled motorist using those wig-wag lights in a way that the motorist might have interpreted him to be a police officer. I looked at the fact that there were handcuffs and a police scanner in the vehicle. I also put a lot of weight on the fact that the defendant was evasive and not honest about those wig-wag lights, and I looked at the fact that that tape recorder was hidden.

J.A.179-80.

Mr. Alford did not take exception to any of the court's instructions to the jury. Jury Instruction 10 (J.A.199-200) described what each party was required to prove to prevail. It stated in pertinent part:

> On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> * * *
>
> 3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.
>
> * * *

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful;

* * *

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

J.A. 199-200.

Jury Instruction 12 did not limit the jury's consideration of probable cause to the Privacy Act violation. Rather, it stated:

> "An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime."

J.A. 201.

The jury reached a unanimous verdict in favor of Petitioners. J.A. 207. Viewed most favorably to the Petitioners, there was more than adequate evidence for the jury to have found that there was probable cause for Mr. Alford's arrest and to have found that a reasonable officer would have believed that Mr. Alford's arrest was lawful.

Mr. Alford moved for a new trial which was denied. He then timely appealed to the Ninth Circuit. In his appeal, Mr. Alford did not raise the "closely related offense doctrine" and consequently, that issue was not briefed by the parties. The Ninth Circuit raised the "closely related offense doctrine" *sua sponte*, a little over two weeks prior to oral argument, when the court below directed the parties to be prepared to discuss footnote 6 on page 1428 in *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho*, 515 U.S. 1144 (1995) (discussing the "closely related offense doctrine"). Pet. 24a.

In a split decision, the Ninth Circuit panel invoked the "closely related offense doctrine" to rule that the District Court abused its discretion in denying Mr. Alford's motion for a new trial. The majority reasoned that there was no probable cause for arrest under the Privacy Act because "[t]ape recording officers conducting a traffic stop is not a crime in Washington". Pet. 9a.[2] The majority then

[2] Judge Gould dissented arguing that Petitioners were entitled to qualified immunity for the Privacy Act arrest. The

rejected the alternative offenses for which probable cause to arrest Mr. Alford existed (impersonating an officer and obstructing an officer) based on the "closely related offense doctrine". Pet. 10a.

The majority below explained that, under the "closely related offense doctrine", "[p]robable cause to arrest may still exist . . . for a *closely related* offense even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested". Pet. 10a. The majority determined that the conduct underlying the additional offenses was "unrelated to Alford's tape recording" of his conversation with the officers. *Id.* "Any impersonation charge would be based on Mr. Alford's use of wig-wag headlights. An obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag headlights . . .". Pet. 10a-11a. The majority disregarded probable cause to arrest Mr. Alford with respect to these offenses simply because the "offenses are not closely related to the crime for which [petitioners] arrested [Alford] . . . tape recording a traffic stop". Pet. 11a.

The majority below went on to deny qualified immunity to the officers, rejecting the argument that the "closely related offense doctrine" was not clearly established. Pet. 12a-13a, n.2. The Ninth Circuit concluded that the "closely related offense doctrine"

---

dissent observed that the officers "read a statute before making an arrest, saw it literally covered the challenged conduct, and double checked with a prosecuting attorney". The dissent concluded that the officers "were acting reasonably, even if it turned out that the officers' belief about the law was incorrect". Pet. 22a.

was clearly established, citing *Gasho*, 39 F.3d at 1428 n.6. *Id.* In reaching its "clearly established law" conclusion, the Ninth Circuit failed to acknowledge or consider that Washington courts do not follow the doctrine (*see Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied* 119 Wn.2d 1007 (1992) (an arrest will be upheld as long as probable cause objectively existed to arrest for any crime)) and summarily dismissed a conflicting circuit court decision, including *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973). Pet. 10a. Petitioners cited both of these cases to the Ninth Circuit.

The Ninth Circuit reversed the District Court's denial of Mr. Alford's motion for a new trial. The Ninth Circuit subsequently denied Petitioners' timely petition for rehearing and rehearing en banc. Pet. 23a. Petitioners filed a timely petition for a writ of certiorari that was granted April 19, 2004.

SUMMARY OF ARGUMENT

1. An arrest that is objectively supported by probable cause does not violate the Fourth Amendment simply because the probable cause is for a crime unrelated to the crime articulated by the arresting officer. Probable cause for arrest is measured by an "objective reasonableness" test. Under this test, probable cause for arrest exists and an arrest is reasonable under the Fourth Amendment if at the time of arrest, the totality of facts and circumstances known to the officer would lead a reasonable officer to believe that an offense has been committed. Neither the officer's subjective belief as to the existence of probable cause, nor the officer's subjective motives in making the arrest bear

on the existence of probable cause. The evaluation is purely objective.

2. The Ninth Circuit departed from the "objective reasonableness" test in evaluating probable cause for Mr. Alford's arrest, and found probable cause lacking predicated on the "closely related offense doctrine". Under this doctrine, a court evaluates probable cause for arrest based only on those facts and circumstances known to the officer at the time of arrest which are closely related to and arise from the same conduct as the offense that the officer announces at arrest. Thus, the doctrine precludes consideration of facts and circumstances that objectively establish probable cause to arrest, where the officer announces an offense(s) for which probable cause to arrest does not exist, and either subjectively fails to appreciate that probable cause exists for other unrelated offenses, or subjectively decides not to announce or "stack" other unrelated offenses in making the arrest. In each of these respects, the "closely related offense doctrine" disregards objectively existing probable cause for arrest and irreconcilably conflicts with the Court's "objective reasonableness" test for probable cause.

3. The Ninth Circuit also erred in suggesting that the "closely related offense doctrine" is necessary to avoid "sham" arrests or "later extrapolated justification" for arrest. The "objective reasonableness" test adequately safeguards against wrongful arrest by requiring probable cause to be based on facts and circumstances existing and known to the officer at the time of arrest. The Ninth Circuit's additional suggestion that the "closely related offense doctrine" somehow vindicates

objective reasonableness is refuted by the very nature of the doctrine. The doctrine excludes from the probable cause determination facts and circumstances known to the officer at the time of arrest, that objectively viewed, establish probable cause. In addition, the doctrine inappropriately intrudes on prosecutorial discretion to evaluate all of the relevant circumstances and determine the most appropriate charge to pursue.

4. Even if the "closely related offense doctrine" were sound and served to vitiate probable cause for Mr. Alford's arrest, Petitioners would be entitled to qualified immunity because the doctrine was not clearly established law. In concluding otherwise, the Ninth Circuit failed to consider all relevant precedent. Specifically, it failed to consider that Washington, other states, and other circuits follow the "objective reasonableness" test of the Court, not the "closely related offense doctrine". The Ninth Circuit also failed to recognize that its own cases discussing the doctrine did not, and still do not, clearly or consistently apply the preclusive aspect of the doctrine. Under such circumstances, the law was not clearly established and the Ninth Circuit erred in denying Petitioners qualified immunity.

The judgment of the Ninth Circuit should be reversed.

ARGUMENT

A. When Properly Assessed Under The "Objective Reasonableness" Standard, Mr. Alford's Arrest Was Lawful

1. The Court Consistently Applies An "Objective Reasonableness" Test In Assessing The Existence Of Probable Cause To Arrest

As a seizure of a person, an arrest is subject to the reasonableness requirement of the Fourth Amendment. An "arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment". *United States v. Robinson*, 414 U.S. 218, 235 (1973). Probable cause, in turn, exists if "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense (the "objective reasonableness" test). *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In analyzing Fourth Amendment claims of unlawful search and seizure, the Court consistently applies this "objective reasonableness" test. The test focuses on the facts and circumstances known to the officer at the time of arrest. *Id.; see also Illinois v. Gates,* 462 U.S. 213, 238 (1983) (applying a "totality of the circumstances" analysis to determine probable cause for search warrant); *Alabama v. White,* 496 U.S. 325, 330-31 (1990) (considering the "totality of the circumstances" in evaluating reasonable suspicion for investigatory stop).

The law enforcement officer's subjective beliefs or motives play no role in this Fourth Amendment

analysis, as demonstrated by decisions of the Court considering the validity of actions under the Fourth Amendment in several different contexts. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), the Court held that if the objective probable cause test is met, it is not necessary to establish that the particular officer making the arrest or search subjectively believed that probable cause was present. The Court observed, "[t]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Royer,* 460 U.S. at 507 (*citing Peters v. New York, decided with Sibron v. New York,* 392 U.S. 40, 66-67 (1968)).

The "objective reasonableness" test also applies without regard to the motives of the officers involved. For example, in *Robinson,* the Court declined to suppress evidence discovered during the search of a suspect incident to a lawful arrest. The Court rejected the suggestion that the validity of the search depended on the subjective belief of the officer with respect to the need for the search. "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that the [arrestee] was armed". *Robinson,* 414 U.S. at 236.

To the same effect, in *Scott v. United States,* 436 U.S. 128 (1978), the Court declined to suppress telephone conversations intercepted by a wiretap on the basis that the federal agents did not subjectively

intend to minimize interception of non-targeted conversations. The statute under which the wiretap was authorized contained a minimization requirement. The Court explained, "the fact that the officer does not have the state of mind . . . hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action". *Scott*, 436 U.S. at 138. In analyzing a Fourth Amendment excessive force claim, the Court similarly observed that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional". *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Court applied the same principle in the context of a traffic stop in *Whren v. United States*, 517 U.S. 806 (1996). There, the Court held that a traffic stop supported by probable cause was not invalidated because the officers' actual motivation for the stop was enforcing drug laws. The Court reiterated that ulterior motives on the part of the arresting officer will not invalidate objectively justifiable behavior. *Id.* at 812 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n.3 (1983); *United States v. Robinson*, 414 U.S. 218 (1973); and *Scott v. United States*, 436 U.S. 128 (1978)). The *Whren* Court described *Villamonte* as "flatly dismiss[ing] the idea that ulterior motive might serve to strip the agents of their legal justification" *Whren*, 517 U. S. at 812. Further, in describing its decision in *United States v. Robinson*, the *Whren* Court stated: "we held that a traffic-violation arrest

. . . would not be rendered invalid by the fact that it was a mere pretext for a narcotics search". *Whren*, 517 U.S. at 812-13. The Court subsequently applied the same principle to a traffic arrest based on probable cause in *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

Thus, the "objective reasonableness" test applies regardless of whether the officer was operating under a mistaken belief about the law, *Royer*, and regardless of the officer's motivation for the challenged action. *Robinson*; *Scott*; *Whren*. The validity of the challenged action, whether a stop, an arrest, or a search, is determined by whether the action was objectively supported by adequate cause.

In this case, then, under the "objective reasonableness" test, it should not matter that the arresting officer articulated an offense not supported by probable cause in arresting Mr. Alford, when an objective assessment of the facts and circumstances existing at the time of arrest established probable cause for his arrest. Nor should it matter that in arresting Mr. Alford, the officer did not articulate an offense closely related to one for which probable cause to arrest objectively existed. Substantial evidence of probable cause was presented to support the jury's verdict in favor of the Petitioners, and the Ninth Circuit erred in setting the verdict aside.

2. The "Closely Related Offense Doctrine" Irreconcilably Conflicts With The Court's Precedent And Improperly Limits The Inquiry Into Probable Cause

The "closely related offense doctrine" irreconcilably conflicts with the Court's Fourth Amendment jurisprudence. Unlike the "objective reasonableness" test, the "closely related offense doctrine" restricts the probable cause inquiry and requires a court to ignore facts and circumstances existing at the time of arrest in evaluating probable cause. Under the doctrine, only facts and circumstances "closely related" to the offense articulated by the officer, that "involves the same conduct" for which the arrest was made, may be taken into account. Pet. 10a-11a. This is plainly contrary to weighing all of the relevant facts and circumstances existing at the time of arrest, known to the arresting officer, as permitted by the "objective reasonableness" test. *Beck*, 379 U.S. at 96.

The "closely related offense doctrine" also contravenes the "objective reasonableness" test, because the doctrine requires the court to ignore probable cause based on the beliefs or motivations of the arresting officer. In this case, the "closely related offense doctrine" discarded facts and circumstances that in fact established probable cause to arrest, based on the officer's subjective misunderstanding as to the offense(s) for which probable cause existed, and the officer's subjective choice to articulate fewer than all of the offenses that justified arrest.

That the "closely related offense doctrine" irreconcilably conflicts with the Fourth Amendment

jurisprudence of the Court perhaps is most apparent when one compares this case to *Royer*. Under *Royer*, 460 U.S. at 507, if law enforcement officers do not believe they have probable cause to arrest, but actually do, the arrest is valid. In the instant case, under the "closely related offense doctrine", if law enforcement officers believe they have probable cause to arrest and in fact do, but for an offense not related to the offense they articulate, the arrest is invalid. An officer's mistaken belief about the particular offense(s) for which probable cause exists no more violates the Fourth Amendment than a mistaken belief that probable cause does not exist at all.

The Ninth Circuit erred in relying on the "closely related offense doctrine" to vitiate probable cause for Mr. Alford's arrest and to set aside the jury verdict in favor of Petitioners.

3. The "Closely Related Offense Doctrine" Is Ill-Suited To Achieve Its Proffered Objectives And Produces Illogical And Unjust Results

The Ninth Circuit offers two justifications for the "closely related offense doctrine". First, the majority below states that the doctrine "accounts for the possibility" of sham arrests or "later extrapolated justifications" for arrest. Pet. 13a, n.2. Second, the majority below asserts that the doctrine focuses on the "objective reasonableness" of the arrest. *Id.* Neither of these proffered justifications for the doctrine is sound.

The Ninth Circuit's use of the "closely related offense" doctrine to preclude "later extrapolated justifications" for arrest and so-called "sham arrests" reflects a fundamental failure to recognize that the "objective reasonableness" test governs the existence of probable cause. Pet. 13a, n.2. The "objective reasonableness" test is concerned only with *whether* the facts and circumstances existing and known at the time of arrest provide probable cause to arrest. Under the "objective reasonableness" test, it does not matter *when* justification for the arrest first occurs to the arresting officer, or *when* justification for the arrest first is articulated by the officer. Yet the Ninth Circuit's concern with "later extrapolated justification" for arrest is about nothing else.

Moreover, even if the "closely related offense doctrine" advanced a legitimate purpose in precluding "later extrapolated justification" for arrest, its allowance of "later extrapolated justification" for closely related offenses, lacks rationality. If a "later extrapolated justification" for arrest is evil, it is no less evil simply because the "later extrapolated justification" concerns the same conduct as the wrongly cited offense.

In addition, the majority below fails to explain how the "closely related offense doctrine" discourages sham arrests to any greater extent than the "objective reasonableness" test. There is no good reason to believe that it does. For an arrest to be valid under the "objective reasonableness" test, the facts and circumstances existing and known to the officer at the time of the arrest must establish probable cause. *Beck*, 379 U.S. at 96. The test does not allow the officer to rely on post-arrest facts or

circumstances to fill any void in probable cause. *Id.* The "objective reasonableness" test thus provides no incentive to officers to arrest persons without probable cause. To the contrary, the test plainly discourages sham arrests by precluding consideration of post-arrest facts and circumstances in evaluating the validity of the arrest. Nor is it rational to believe that the "objective reasonableness" test encourages an officer to make an arrest where the officer does not believe probable cause exists, on the slim hope that it actually does.[3]

The second rationale offered by the Ninth Circuit majority for the "closely related offense doctrine" – that it eviscerates "objective reasonableness" – simply is incorrect. Pet. 13a, n.2. The "closely related offense doctrine" does not look at the totality of the facts and circumstances existing at the time of the arrest to determine whether objectively viewed, they provide probable cause for arrest. Instead, the doctrine precludes consideration of relevant facts and circumstances simply because the officer has cited an offense for which probable cause did not exist and that offense is not "closely related" to an offense or offenses for which probable cause did exist. Thus, the doctrine turns the analysis on its head, making it one of "subjective reasonableness".

The doctrine also turns the validity of an arrest into little more than a game that the arrestee wins even where there is probable cause for arrest, simply because the officer makes a mistake in

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[3] *See* Wayne R. La Fave & Jerald H. Israel, *2 Crim. Proc.*, § 3.1(d) (2d ed. 2004) terming such an assumption "fanciful".

announcing the offense. And the arrestee wins even where, as in this case, there is absolutely no suggestion that the officers were endeavoring to make a sham arrest.[4] Such a doctrine does not advance the interests of justice.[5]

4. The Closely Related Offense Doctrine Intrudes On The Proper Exercise Of Prosecutorial Discretion

Typically, within the criminal justice system, the initial on-the-spot decision by a police officer of what offense to cite for the arrest is reviewed pre-filing by supervisors or, as occurred in this case, by a prosecuting attorney. *See,* 1 Wayne R. La Fave, Criminal Practice Series, *Criminal Procedure, The Decision to Charge* § 1.3(8) (3d ed. 1996). The

[4] As the dissenting judge recognized:

> "The officers whom the majority would tag with liability, despite an exculpatory jury verdict . . . stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least. After stopping and questioning Alford . . . the real officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted". Pet. 17a.

[5] Moreover, limiting consideration of probable cause to matters closely related to the articulated offense, risks encouraging officers to cite a suspect for every possible offense to avoid civil rights liability and prevent suppression of evidence. This otherwise needless "stacking" of charges could have the unfortunate consequences of higher bail and longer pre-arraignment and pretrial detention of criminal suspects. *See United States v. Atkinson,* 450 F.2d 835, 838 (5th Cir. 1971) ("Such a clogging of the criminal process already heavily encumbered would be pointless".)

prosecutor plays an important role in the criminal justice process, including independent review and evaluation of the nature and degree of the criminal charge which will be pursued. *See generally, Imbler v. Pachtman,* 424 U.S. 409, 423 (1976) (recognizing the need to protect the independence and courage of prosecutors in, *inter alia,* charging decisions through absolute immunity). The Court has repeatedly noted that "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion". *Wayte v. United States,* 470 U.S. 598, 608 (1985) quoting *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978). In *Wayte,* the Court also noted that this broad discretion rests largely on the recognition that decisions to prosecute are ill-suited to judicial review. *Id.*

When a prosecutor determines that a charge is not supported by a probable cause, no sound policy is served by precluding the prosecutor from amending the charge to one for which probable cause does exist. The prosecutor's discretion in this respect does not interfere with prompt judicial review of whether probable cause exists to detain the suspect, which must occur no later than 48 hours after arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). Subsequently, a prosecutor should have authority to amend a charge as additional information is discovered. By limiting prosecutors' filing decisions, the "closely related offense doctrine" ill-serves the criminal justice system.

B. Even If The "Closely Related Offense Doctrine" Is Valid, Petitioners Are Entitled To Qualified Immunity Because The Doctrine Was Not Clearly Established Law

As section A of this brief demonstrates, Mr. Alford's arrest did not violate the Fourth Amendment. For that reason, there is no need for any further inquiry concerning qualified immunity. *Saucier v. Katz*, 533 U.S. at 201. Even if there were, Petitioners are entitled to qualified immunity because the "closely related offense doctrine" was not clearly established.

1. Qualified Immunity Applies Absent Violation of Clearly Established Law

Public officers acting in their official capacities are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is defined quite broadly to provide a deferential standard under which public officers can operate. "It provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized". *Malley v. Briggs*, 475 U.S. 335, 341 (1986). To be considered "clearly established" for purposes of qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right". *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In determining whether the law was clearly established, a court should consider "all relevant precedents". *Elder v. Holloway*, 510 U.S. 510 (1994). In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court considered whether it was clearly established that the Fourth Amendment would prohibit law enforcement officers from allowing media representatives to accompany them in executing an arrest warrant inside a private residence. The Court began with the observation that the question was "by no means open and shut" and looked to a wide range of sources before concluding that the law was not clearly established. *Id.*, at 616. The Court referenced an intermediate state appellate decision, unpublished decisions of federal District Courts and a written policy of the relevant law enforcement agency. *Id.*, at 616-617. The Court additionally observed that the plaintiffs had not identified "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that these actions were lawful". *Id.*, at 617. *See also Burgess v. Lowery*, 201 F.3d 942, 944-45 (7th Cir. 2000) (precedent from other circuits must be considered in determining whether a right was clearly established); *Richardson v. Selsky*, 5 F.3d 616, 623 (2nd Cir. 1993) (declining to hold prison officials to a standard of conduct that was subject of conflicting federal District Court decisions).

2. The "Closely Related Offense Doctrine" Was Not Clearly Established Law

Even assuming its validity, the "closely related offense doctrine" was not clearly established law for at least two reasons. First, the majority below failed to consider all relevant precedent when it concluded that the doctrine was clearly established law. Second, the Ninth Circuit did not consistently articulate or apply the doctrine – and still does not. When all relevant precedent is considered, including Washington law and the law of other federal circuits and states, the "closely related offense doctrine" was anything but clearly established.

a. The Ninth Circuit failed to consider all relevant precedent

The *Alford* majority erred by failing to consider all relevant precedent in concluding that the "closely related offense doctrine" was clearly established. First, the Ninth Circuit failed to note or take into account that Washington does not apply the "closely related offense doctrine". In a host of cases, including *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash.2d 1007 (1992), cited to the Ninth Circuit by Petitioners, Washington courts evaluate the validity of an arrest under the "objective reasonableness" test enunciated by the Court. *See, e.g., Washington v. Vangen*, 72 Wash. 2d 548, 433 P.2d 691 (1967); *City of Seattle v. Cadigan*, 55 Wash. App. 30, 776 P.2d 727, *review denied*, 113 Wash.2d 1025 (1989); *Washington v. Stebbins*, 47 Wash. App. 482, 735 P.2d 1353, *review denied*, 108 Wash.2d 1026 (1987); *Washington v. Greene*, 75 Wash.2d 519, 521, 451 P.2d 926, 928 (1969).

In addition, as noted in the amicus brief of California in support of the petition for a writ of certiorari in this case, Washington is not the only state in the Ninth Circuit that follows the Court's Fourth Amendment jurisprudence and finds an arrest lawful as long as probable cause exists to arrest for any crime.[6] California does. *See People v. Rodriguez*, 53 Cal. App. 4th 1250, 1262 (1997); *In re Justin K.*, 98 Cal. App. 4th 695, 699 (2002). So does Alaska. *See Alaska v. Kendall*, 794 P.2d 114, 117 (1990) (requiring officers to state correct ground for arrest would cause officers to state every possible ground and exclude evidence in cases where the person arrested had not had his rights violated).[7]

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[6] The Court has never even mentioned the so called "closely related offense doctrine". In *United States v. Di Re*, 332 U.S. 581, 592 (1948), the Court assumed, without deciding: " . . . that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable cause to believe that any felony found in the statute books had been committed . . .".

[7] Many states outside the Ninth Circuit also do not apply the "closely related offense doctrine". *See Golden v. Commonwealth of Virginia*, 30 Va. App. 618, 519 S.E.2d 378 (Va. App. 1999); *State v. Cote*, 547 So.2d 993 (Fla. App. 4 Dist., 1989); *People v. Kincy*, 435 N.E.2d 831 (Ill. App. 2 Dist., 1982); *Tennessee v. Duer*, 616 S.W.2d 614 (Tenn. Crim. App. 1981). New Hampshire, Rhode Island and Delaware statutes provide that an arrest will be upheld even if the officer charged the wrong offense. N.H. Rev. Stat., § 594:13; R.I. Stat. Gen. Laws Of R.I. Ann., 1956, Title 12. Crim. Proc., Chapter 7. Arrest; Del. Code. Ann., Title 11, § 1905. The Uniform Arrest Act contains an analogous provision. § 7 of the Uniform Arrest Act. *See*, Warner, *The Uniform Arrest Act*, 28 Va. Law Rev. 315, 346 (1942).

The law of Washington and the other states in the Ninth Circuit is particularly significant in this context, as it directly bears on the viability of a federal civil rights claim. If the prosecutor had decided to charge Mr. Alford with either of the two offenses for which probable cause existed, a permissible course under Washington law, a conviction would have precluded this challenge to the validity of his arrest. *See Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995) (existing conviction barred false arrest claim under *Heck v. Humphrey*, 512 U.S. 477 (1994); *Malladay v. Crunk*, 902 F.2d 10 (8th Cir. 1990) (applying common law rule that a plaintiff cannot recover under 28 U.S.C.§ 1983 for an arrest resulting in conviction).

The Court has recognized that the authority of state and federal courts to independently address questions of federal law will cause conflicts and frictions to occur when contrary interpretations are made. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). When these conflicts inevitably occur, and a state's highest court and federal circuit court are irreconcilably in conflict on a question of constitutional magnitude, a final resolution of the disagreement by the Court is necessary before the law is clearly established.[8] The law on qualified immunity does not require public officials to simultaneously serve two masters - choosing between

[8] By analogy, under *ADEPA*, 28 U.S.C. § 2254(d), a circuit court cannot abrogate a state decision on a constitutional issue unless it is contrary to clearly established United States Supreme Court precedent, not dicta. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

conflicting state and circuit court decisions - to avoid civil rights liability.

In addition, the Ninth Circuit explicitly declined to give any weight to conflicting precedent from other circuits with respect to the validity of the "closely related offense doctrine". The *Alford* majority dismissed *United States v. Saunders*, 476 F.2d at 6-7 (verbal announcement of the wrong offense does not vitiate an arrest if probable cause exists for another crime) noting only: "Whatever the rule may have been in that circuit, this is not the test applied in the Ninth Circuit". Pet. 10a.[9]

The *Alford* majority's disregard of conflicting authority is contrary to the Court's recognition that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy". *Wilson v. Layne*, 526 U.S 603 (1999). As the Court noted, "given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law". *Wilson*, 526 U.S. at 617-18, *citing Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Law enforcement officials are not required to always err on the side of caution when the law is not clearly established, *See Davis v. Scherer*, 468 U.S. 183, 196 (1984), *citing Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).

[9] Although *Saunders* has not been overruled, it apparently is no longer followed in the Fifth Circuit. *See Vance v. Nunnery*, 137 F.3d 270 (5th Cir. 1998). *Saunders* is still cited as precedent in the 11th Circuit, which was formerly part of the Fifth. *See Lee v. Ferraro*, 284 F.3d 1188, 1196 (11th Cir. 2002) quoting *Saunders*, 476 F.2d at 7.

b. The Ninth Circuit has not consistently applied the "closely related offense doctrine"

The majority below concluded that the decision of the Ninth Circuit in *Gasho* was controlling authority, clearly establishing the applicability of the "closely related offense doctrine" to this case. Pet. 12a-13a, n.2. Despite this statement by the Ninth Circuit, the applicability of the doctrine was not clearly established at the time this case arose, and in fact, still is not clearly established.

In *Gasho,* the question of whether the "closely related offense doctrine" restricts facts and circumstances that may be considered in evaluating probable cause for arrest to those arising from the same conduct as the articulated offense, was not at issue. That is so because the offense for which Gasho was arrested "unlawful removal of property under the control or custody of customs", 18 U.S.C. § 549, was closely related to the offenses for which probable cause actually existed, foreseeable rescue of seized property under 18 U.S.C. § 2233 or removal of property to prevent seizure, 18 U.S.C. § 2232. Thus, *Gasho* neither decided whether the doctrine precludes probable cause to arrest for unrelated offenses in evaluating the validity of an arrest, nor held that it did. For this reason, *Gasho* cannot fairly be said to have clearly established the preclusive effect of the doctrine.

Additional Ninth Circuit cases make the state of the law with respect to the doctrine even less

clear. In *United States v. Patzer,* 284 F.3d 1043, 1045 n.4 (9th Cir. 2002), the Ninth Circuit, albeit in dicta, cited *United States v. Bookhardt,* 277 F.3d 558 (D.C. Cir. 2002) for the proposition that "an arrest is . . . valid if the same officer had probable cause to arrest the defendant for another offense". The Ninth Circuit termed this a "true statement of law" without intimating that the rule was restricted to probable cause to arrest for a closely related offense(s). *Id.*

In addition, while Mr. Alford's appeal was pending before the panel in this case, a different three judge panel of the Ninth Circuit issued an opinion in *Bingham v. City of Manhattan Beach,* 329 F.3d 723 (9th Cir. 2003) (*Bingham* I). In *Bingham* I, an adult driver was arrested for driving with an expired license. The governing statute authorized arrest of drivers for this offense only if they were age sixteen or younger. The driver subsequently brought a civil rights action alleging unlawful arrest.

In a split decision, the *Bingham* I panel held that the officer was entitled to qualified immunity because there was probable cause to arrest the driver to verify an outstanding warrant — the facts and circumstances of which were entirely unrelated to the articulated offense of driving with an expired license. Petitioners cited *Bingham* I to the panel still considering *Alford,* but to no avail. Pet. 59a-60a.

After the Ninth Circuit issued its opinion in this case, purporting to find the "closely related offense doctrine" well established in *Gasho,* it amended the opinion in *Bingham* I. *See Bingham v. City of Manhattan Beach,* 341 F.3d 939 (9th Cir. 2003) (*Bingham* II). *Bingham* II suggests that the court declined to apply the doctrine in that case

because the facts did not give rise to concern that the outstanding warrant was an "ex post facto" justification for the driver's arrest. *Bingham* II, 341 F.3d at 952.

In this respect, the circumstances in *Bingham* II are not different from the circumstances in this case. In neither case was there an effort to rely on facts or circumstances arising post-arrest to establish probable cause. Yet under the Ninth Circuit's "clearly established law", the doctrine applies to this case to preclude facts giving rise to probable cause for arrest, but not to the legally analogous circumstances of *Bingham* II.

Where, as here, the Ninth Circuit's precedents remain inconsistent in describing and applying the "closely related offense doctrine", neither the doctrine nor its applicability to this case was clearly established law. *Wilson v. Layne,* 526 U.S. at 616-618.

When all relevant precedent is considered, even today, the "closely related offense doctrine" is not clearly established. It hardly would be plain to all but an incompetent officer that an arrest is unlawful even where there is probable cause for arrest, if the offense articulated by the officer is not "closely related" to an offense for which probable cause to arrest exists. In light of the clear divergence of authority, state and federal, on whether a court is constitutionally required to ignore the existence of probable cause for an offense unrelated to one cited at the time of arrest, Petitioners are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GERALD DEVENPECK, a Washington State Patrol Officer,
JOI HANER, a Washington State Patrol Officer,
and their marital communities,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For the purpose of qualified immunity, was the law clearly established when there was a split in the Circuits regarding the application of the "closely related offense doctrine", the Ninth Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

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SUMMARY OF THE ARGUMENT

In this case, two State Troopers arrested Tony Alford for something that was, quite simply, not a crime – tape-recording his own traffic stop on a public highway. The officers' later attempts to justify the arrest based on conduct separate and distinct from that giving rise to the arrest were properly rebuffed by the Court of Appeals. Although officers can be entitled to qualified immunity for technical defects, such as using improper legal nomenclature in the charging or booking of criminal conduct, they are not entitled to rationalize a bad arrest by dredging up any illegal conduct they can later identify. This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity.

The Court of Appeals properly applied the inquiry of objective reasonableness to the predicate conduct that led to the arrest. In so doing, the Court of Appeals correctly struck a balance between the rights of the public and the practicalities of policing, allowing qualified immunity only where the same conduct for which the person was arrested furnishes probable cause to arrest. By doing so, the Ninth Circuit, in keeping with its own precedent and that of a majority of other circuits, adeptly avoided injecting an impermissible element of subjectivity into the qualified immunity analysis, and declined to engage in a journey down the rabbit hole to rationalize an obviously unlawful arrest.

Likewise, this analysis comported with this Court's precedents, and closely adhered to the policies underlying the doctrine of qualified immunity. In so doing, the lower court correctly declined to rewrite the doctrine of qualified immunity to allow either an inquiry into the officers'

subjective intentions, or an ex-post-facto search for justification for an arrest.

The law in the Ninth Circuit was clear that unrelated conduct could not be used by law enforcement to "cleanse" a bad arrest, as the Ninth Circuit had adopted the closely related offense doctrine several years prior to Mr. Alford's arrest.

I. ARGUMENT

THE CLOSELY-RELATED OFFENSE DOCTRINE CORRECTLY FOCUSES THE SCOPE OF THE OBJECTIVE REASONABLENESS INQUIRY CALLED FOR IN ADDRESSING QUALIFIED IMMUNITY CLAIMS. IT DOES THIS BY PROPERLY REQUIRING THAT PROBABLE CAUSE BE FOUND IN THE OSTENSIBLY CRIMINAL CONDUCT UPON WHICH THE OFFICERS ACTUALLY ACTED.

It is unfortunate, but inarguable, that so long as one man is given power over another, there will be abuses of that power.[1] Our Constitution, however, attempts to forestall such abuses by memorializing the "self-evident" rules derived from the common law and deemed to be inherent in a free society. To that end, the Fourth Amendment provides, in relevant part, that "the right of the people to be secure in their persons, houses, papers, and effects, against

1. Samuel Adams wrote that "Power is intoxicating; and men legally vested with it too often discover a disposition to make ill use of it and an unwillingness to part with it." Samuel Adams, *The Writings of Samuel Adams,* Harry Cushing, Ed. G.P. Putnam's Sons, New York Volume IV, 1904-1908, p. 214.

unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend IV.[2]

This "core value"[3] of freedom from unreasonable search and seizure would be merely aspirational without some enforcement mechanism. Thus, in a society subject to the rule of law, recourse to the judicial system is viewed as "the only realistic avenue for vindication of constitutional guarantees." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982)).[4]

Violations of these rights are actionable under 42 U.S.C. § 1983, which is derived from the Civil Rights Act of 1871. *Monroe v. Pape,* 365 U.S. 167, 180 (1961); *Wilson v. Garcia,* 471 U.S. 261, 276 (1985). The primary function of the statute

2. The Fourteenth Amendment extends these protections to prohibit unreasonable searches and seizures by state actors. U.S. Const. amend XIV; *Elkins v. United States*, 364 U.S. 206, 213 (1960).

3. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 825 (1986) (referring to this as a core value as determined by the text, structure, and history of the Constitution).

4. The possibility of other deterrents, such as criminal prosecutions and internal discipline of offending officers, is cold comfort, indeed. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753, 787 (1993) ("The [internal affairs] division is located within the police department . . . and the entire process is concealed from the public"); *see also* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L.Rev. 509, 535 (1994) (noting that prosecution occurred in only one quarter of 1% of cases of alleged police misconduct).

is simple: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims is such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158 (1992), citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978). In the instant case, that promise of relief will be stripped if the "rationalization test" put forward by the Petitioners is adopted.

Liability requires proof of two essential elements: first, the conduct complained of was committed by a person acting under the color of state law;[5] second, that the conduct deprived the person of rights, privileges or immunities secured by the Constitution of laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986).[6] A search and seizure that violates the Fourth Amendment is actionable under 42 U.S.C. § 1983. *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992).

Even when these elements are proved, however, the judicially-created affirmative defense of qualified immunity "protects governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or

5. In Mr. Alford's case, the law enforcement agents involved were on duty, wore uniforms, and utilized their authority as State Patrol officers to effectuate the unlawful arrest. Thus, the "color of law" element for liability is established, and has not been contested. *See Tennessee v. Garner*, 471 U.S. 1, 5-7 (1985).

6. Since Mr. Alford was detained, arrested, and then incarcerated there is no question but that he was seized, and the protections of the Fourth Amendment were triggered. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

constitutional rights of which a reasonable person would have known." *Saucier v. Katz,* 533 U.S. 194 (2001).[7]

To determine whether an official is entitled to qualified immunity, the court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right . . . and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945-46 (9th Cir. 2003).

A. *The Court of Appeals correctly found that Mr. Alford had a right not to be arrested for conduct that was not, in any sense, criminal. The Court of Appeals properly applied the standard of objective reasonableness only to the predicate acts that led to the arrest, and refused to engage in after-the-fact rationalization.*

Our government is founded on the principle of restraint – restraint of the government from interfering in the lives of citizens. "The right to life, liberty, property, and the pursuit of happiness is not a gift of the state to the individual, but precedes the state." William Ebenstein, *Today's Isms*, 132-33 (3d ed. 1962). "Life and liberty are regarded as standing substantially on one foundation; life being useless without liberty." *State v. Gum*, 69 S.E. 463, 464 (W.Va. 1910).

Courts recognize that arrest is a "severe intrusion on individual liberty," and carries numerous unpleasant consequences. *See Atwater v. City of Lago Vista,* 532 U.S.

7. A defendant's claim of qualified immunity is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

318, 364-65 (O'Connor, J., dissenting) (cataloguing consequences including bodily search, detention, and social stigma). Sadly, even our country has a history of "the use, and not infrequent abuse, of the power to arrest. . . ." *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

To stand as a bulwark against this, the Fourth Amendment prohibits unreasonable arrests, and protects us from "rash and unreasonable interferences with privacy and . . . unfounded charges of crime." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). This Court has long held that the Fourth Amendment protects the "inestimable right of personal security," and belongs "as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

Typically, this right is protected by prohibiting the search and seizure by the police of an individual's person in the absence of probable cause. *Florida v. Royer*, 460 U.S. 491, 498 (1983); *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

Police have probable cause to effect a warrantless arrest only when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

At its core, however, the "ultimate measure" of a search, or a seizure, is "reasonableness." *See Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is

'reasonableness.'"); *Carroll v. United States*, 267 U.S. 132, 147 (1925) ("The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable").

Here, the Petitioners attempt to circumvent the reasonableness requirement of the Fourth Amendment by seeking qualified immunity in instances wherein arguable probable cause could be generated from actions unconnected with those actually underlying the arrest. If qualified immunity is applied in this manner, it can truly be viewed as a nothing more than an intellectual conceit designed, indeed, almost guaranteed, to allow deprivations of constitutional rights with no hope of redress.[8] This is eminently unreasonable, and does not comport with the history, or philosophy, of the Fourth Amendment or the doctrine of qualified immunity.

B. *The "same conduct" or "related offense" doctrine strikes a proper balance, utilizing the objective reasonableness standard required by this Court's precedent while honoring the goals of qualified immunity doctrine by refusing to attenuate the analysis to unrelated conduct.*

"Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location:" Recent Developments in the Qualified Immunity Defense*, 57 NYU

8. To put it bluntly, "[I]t is monstrous that courts should aid or abet the law-breaking police officer." *Harris v. New York*, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting). If that is allowed to happen, both we, and the Fourth Amendment "are in danger of standing for nothing." T.S. Eliot, *The Idea of a Christian Society*.

Annual Survey of American Law 445, 447 (2000). Thankfully, the closely-related offense doctrine imposes a balancing that is based on common sense and sound judgment, is in keeping with the teachings of the common law, and is consonant with the aims of qualified immunity. By contrast, expanding qualified immunity unduly by adopting the proposed "rationalization test" would wreak havoc with these fundamental principles, and afford officers a near constitutional carte blanche.

1. *The contours of the "closely related offense" or "same conduct" doctrine.*

Under the "related offense" or "same conduct" doctrine, the inquiry into whether the actions of law enforcement were objectively reasonable is focused on the conduct that led to the arrest itself, and is not attenuated to unrelated conduct. The same conduct test is invoked only when the officers lacked objective probable cause for the crime for which the person was arrested. Thus, the relevant inquiry is: Viewed objectively, could the conduct that served as the basis of the arrest provide probable cause for another charge to a reasonable officer in the same situation? *Trejo v. Perez,* 693 F.2d 482, 485 (5th Cir. 1982).

This is "consistent with the teachings" of qualified immunity, as it precludes allowing an officer to argue about his intentions, or reasons, regarding charging, and focuses on the objective facts of the arrest itself, and an objective analysis of the predicate conduct. *Sheehy v. Plymouth,* 191 F.3d 15, 20 (1st Cir. 1999). However, it strikes a balance by still providing protection for the officer, as it insulates officers from liability for mere "erroneous legal description of the basis for an arrest" if another officer would have

concluded that "there was probable cause to arrest for a related offense on the basis of the same conduct." *Id.*

Limiting the inquiry to the "same conduct" as that which formed the basis for the actual arrest allows the officer to "choose which crime she will charge without having to charge every single offense sustainable on the facts," *Biddle v. Martin,* 992 F.2d 673, 677 (7th Cir. 1993), but prevents the officer from later offering "ex post facto extrapolations of all crimes that might have been charged. . . ." *Richardson v. Bonds,* 860 F.2d 1427, 1431 (7th Cir. 1988). The Courts well understand that such a broadening would "open the door" to endless explanations, rationalizations, and justifications. *Sheehy*, 191 F.3d at 21.

As the Fifth Circuit has pointed out, this inquiry does *not* depend upon a subjective component. By requiring a nexus between the charged offense and the later justification, the Court noted that the "related" requirement "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-serving statements and speculation." *Trejo,* 693 F.2d at 486.[9]

9. Rejecting this "could have done" approach accords well with the cautionary words of this Court, which has stated that "we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" *United States v. Leon,* 468 U. S. 897, 922, n.23 (1984) (quoting *Massachusetts v. Painten,* 389 U. S. 560, 565 (1968) (per curiam) (White, J., dissenting)). Similarly, in *Whren v. United States,* 517 U.S. 806, 813–814 (1996), the Court noted the "evidentiary difficulty of establishing subjective intent." Despite this, Petitioners wish for courts in every § 1983 action to allow them to go through every fact, posit conduct that arguably could have provided probable cause, and then treat them as if they actually *did* arrest (or search) based on that conduct. This is the height, and nadir, of subjective self-indulgence.

Cases applying this doctrine show its eminent practicality. In *Sheehy v. Plymouth*, 191 F.3d 15 (1st Cir. 1999), the Court addressed an arrest made after a fight between neighbors. *Id.* at 17-18. The officer initially stated that Mr. Sheehy was under arrest for failing to give his name; by the time they reached the precinct, the charge had mutated to being disorderly and assault with a dangerous weapon. *Id.* at 18. These charges were dismissed. *Id.*

The District Court applied the related offense doctrine, and granted qualified immunity to the officer. 191 F.3d at 18. The Circuit Court agreed that the related crimes doctrine should be the standard, but noted that "the crime with which the arrestee is charged and the crime offered to the court as a justification for the arrest must relate to the same conduct." 191 F.3d at 19-20. Additionally, the two crimes must be "directed generally at prohibiting the same type of conduct." *Id.* The Court then found that "Sheehy's interaction with Officer Quinn was the sole basis for the arrest," and that Quinn "relied at the police station on prior conduct of Sheehy that unmistakably did not serve as the basis for the challenged arrest." *Id.* at 20-21.

In the Seventh Circuit, probable cause must exist on a "closely-related charge," that is, one that arises from "the same set of facts" that gave rise to the arrest. *United States v. Reed*, 349 F.3d 457, 462-63 (7th Cir. 2003). The Sixth Circuit has adopted this same position in allowing qualified immunity in a case where there was probable cause for a "related offense" that arose from the same conduct. *Avery v. King*, 110 F.3d 12 (6th Cir. 1997).

In the Eighth Circuit, "Where a defendant is arrested for the wrong offense, the arrest is still valid if probable cause

existed to arrest the defendant for a closely related offense." *United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986). Even in the Fifth Circuit, the "related offense" must arise from the same conduct as the charged offense. *See Vance v. Nunnery*, 137 F.3d 270 (5th Cir. 1998). These formulations are identical to that adopted by the Ninth Circuit in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003). *See also Hernandez v. State*, 972 P.2d 730, 735 (Idaho Ct. App. 1999) (declining to "engage in ex post facto extrapolations of all crimes that might have charged on a given set of facts at the moment of arrest to retroactively validate an otherwise unlawful arrest"); *See Hopkins v. City of Westland*, No. 93-1096, 1994 WL 118116, at *4-*5 (6th Cir. Apr. 4, 1994) (adopting the "related charge" doctrine as a defense to claim that no probable cause existed for an arrest); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1080 (8th Cir. 1990); *Sevigny v. Dicksey*, 846 F.2d 953, 956 n.4 (4th Cir. 1988); cf. *Wilkes v. Young*, 28 F.3d 1362, 1371 (4th Cir. 1994) (Phillips, J., dissenting) (stating that an arrest under a warrant charging an offense for which no probable cause exists should not be validated "so long as a post hoc search of the relevant criminal statutes can turn up some other offense for which the issuing official might properly have issued a warrant on the facts before him"), *cert. denied*, 115 S. Ct. 1103 (1995); *State v. Sparks*, 422 S.E.2d 293, 295 (Ga. Ct. App. 1992) (reversing suppression order as "the offense for which plaintiff was arrested and the offense for which probable cause to arrest existed were related"); *C-1 v. City of Horn Lake, Mississippi*, 775 F. Supp. 940, 946 (N.D. Miss. 1990) (failing to find the required "nexus" between a disorderly conduct arrest and the "unrelated" charge of trespassing arising from school melee).

The strength of this standard is that it is truly objective, that is, it is "based on real facts and not influenced by personal beliefs or feelings." Cambridge Advanced Learner's Dictionary (2004) (defining "objective"). The same conduct test does this by examining what is, in reality, a *fait accompli* – the arrest, and the conduct that purported to justify it.[10]

This standard is reminiscent of the words of Chief Justice Warren in *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (dissenting from dismissal of writ of certiorari as improvidently granted.). In that case, Wainwright, a young law student was stopped by the police who were searching for a murder suspect. *Id.* at 600. When he refused to be "humiliated" by the police, he was arrested on a flimsy charge of vagrancy. *Id.* at 601-02. He later scuffled with the police at the station. *Id.*

In addressing whether there was probable cause to arrest Wainwright for murder, the Chief Justice wrote:

> I see no more justification for permitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the "low-visibility" sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges. Nor would holding the police to official records

10. In effect, Petitioners seek to indulge in the "20/20 vision of hindsight" that has been disavowed. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396 (1989) (declining to use hindsight in addressing excessive force).

> frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder. If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge [of vagrancy] to verify their suspicions.

392 U.S. at 605. Most tellingly, Chief Justice Warren observed that while Wainwright could obviously have later been charged with other crimes, "when a controversy arises over the legality of the arrest, the police should be held to the booked offense." *Id.* n.6. This seems in complete harmony with the same conduct test – qualified immunity should be limited, and the limits are those described by the police themselves in the objective fact of the arrest.

In short, the doctrine refuses to allow qualified immunity on the basis of mistaken interpretations that are not actually made, or actions not taken. "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." *Beier v. City of Lewiston,* 354 F.3d 1058, 1071 (9th Cir. 2004). Indeed, the Ninth Circuit has noted that according qualified immunity because the officers "might have" made a different, reasonable mistake with the same outcome "would be to encourage police officers to arrest citizens without ascertaining the applicable legal prohibitions, thereby compromising the protection of the constitutional rights of citizens, with no countervailing benefit in advancing the

public good." *Id.* at 1072 (addressing "incentive scheme" of qualified immunity).

2. *The same conduct test accords with the policies of qualified immunity, the common law, and societal concerns in a free society.*

a. The rationales underlying the qualified immunity defense are not disserved by the same conduct test.

As the Ninth Circuit stated in *Beir v. City of Lewiston,* "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." 354 F.3d at 1071.

Those "policy precepts" were identified, and adopted, in *Harlow*. First, the Court recognized the "strong public interest" in protecting public officials from incurring defense costs,[11] and served that interest by formulating a defense that "permits insubstantial lawsuits to be quickly terminated." *Crawford-El*, 523 U.S. at 590; *Harlow*, 457 U.S. at 814. Second, since subjective motivations are easy to allege, but almost impossible to disprove, use of an objective standard raises questions that can usually be disposed of on summary judgment. *Crawford-El*, 523 U.S. at 585, 590; *Harlow*, 457 U.S. at 817-19. Third, use of an objective standard prevents

11. The Court noted that these "social costs" include not only hard costs, but diversion of officials' energy and deterrence of office-seeking. *Id., citing Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

the "unfairness" of imposing liability on an official who could not fairly be said to "know" that the law forbade his conduct. *Crawford-El*, 523 U.S. at 590-91; *Harlow*, 457 U.S. at 818-19.

On the first point, cases in which the "same conduct" test might be invoked must, by definition, have merit, as extraneous conduct is not even examined unless it is shown (as in this case) that the actual basis for the arrest was unlawful. Thus, *a priori,* these can hardly be termed "insubstantial" claims, and do not fall within the purview of this rationale.

On the second point, only the "same conduct" test will obviate the necessity of conducting an "inherently subjective and highly fact specific" review of the police reports, memories of all involved, etc., all designed to see if probable cause existed for something – anything. *Thornton*, 124 S. Ct. at 2132. Thus, the policy of qualified immunity is served by the doctrine.

Finally, summary judgment will still be available, as the analysis is objective, the relevant conduct readily ascertainable, and liability will not flow unless the law is found to be clearly established. *See Alford v. Haner,* 333 F.3d 972 (9th Cir. 2003) *passim* (Pet. 1a).

b. Allowing qualified immunity based on conduct offered up after-the-fact would amount to a de facto resurrection of the general warrant.

It is inimical to our system to afford qualified immunity on the basis of an "arrest first – justify later" policy, as it would amount to a *de facto* resurrection of the general warrant. Ex post facto extrapolation of reasons for an arrest is evocative of this long-despised artifice.

"General warrants" encompassed two particular forms of legal (or illegal) evil. The first was a warrant that lacked specificity of whom to seize or where to search, leading to warrants for "suspicious persons" or searches of "suspicious places." *See* Davies, 98 Mich. L. Rev. n. 12. The second was a warrant that lacked an adequate showing of the justification for the arrest or search. *Id.* at n. 351. This type is typified in the Virginia Declaration of Rights, adopted in 1776, which described a general warrant as one in which the alleged offense "is not particularly described." Va. Decl. of Rights, art. X, available at. *http://www.yale.edu/lawweb/avalon/virginia.htm* (visited August 20, 2004).

The Framers were particularly concerned with general warrants, which led to searches that were "virtually unrestrained." J. Landynski, *Search and Seizure and the Supreme Court* 20 (1966). Thus, the Framers instituted a scheme designed to "extinguish general searches categorically." W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1499 (1990) (Ph.D. Dissertation at Claremont Graduate School). This mistrust, embodied in both the reasonableness and warrant clauses, is still felt today. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

("a direction by a legislature to the police to arrest all 'suspicious persons' would not pass constitutional muster").

In this instance, the actions of the police can only be justified by affording them a *de facto* general right of arrest. In their press to claim qualified immunity, Petitioners are in the uncomfortable position of arguing that they should be allowed to "arrest first, justify later" – this is the type of broad, unfettered exercise of power that was at the heart of the general warrant, and was most despised by the Framers.[12] Again, the Petitioners posit an untenable position that is almost *in haec verbae* with this two-hundred-year-old prohibition.

c. Qualified Immunity Jurisprudence does not favor unduly limiting the availability of redress, nor overly expanding the ability of officers to escape liability.

The Fourth Amendment should receive "a liberal construction." *Gouled v. United States*, 255 U.S. 298, 304 (1921), and "preserve that degree of respect for the privacy of persons . . . that existed when the provision was adopted." *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). As this Court has made clear, although the very adoption of qualified immunity represented "a balance between the evils inevitable in any available alternative," *Harlow*, 457 U.S. at 813–14, maintaining that balance does

12. Framing Era lawyers "viewed any form of discretionary authority with unease – but delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema. . . ." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999).

not require imposing "serious limitations" on the only practical remedy available. *Crawford-El v. Britton*, 523 U.S. 574, 591-92 (1998) (resisting efforts to raise the bar on qualified immunity by rejecting heightened pleading requirements).

The Court, recognizing the Framers' "pronounced distaste" for broad authority in law enforcement discretionary authority, Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 Yale Law & Policy Review 381, 382 (2001), has properly shown reluctance to craft, or recognize, expansions of police authority, recently cautioning that exceptions are not entitlements. *Thornton*, 124 S. Ct. at 2133 (O'Connor, J., concurring) (stating "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception. . . ."); *Id.* at 2134 (Scalia, J., concurring) (observing "conducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful.").

Recently, the Court held that qualified immunity was not available to an officer who conducted a search pursuant to a warrant that facially failed to particularize the items sought. *Groh v. Ramirez*, 124 S. Ct. 1284 (2004). Finding that the warrant was "plainly invalid," the Court rejected the officer's contention that the search was, nonetheless, reasonable. *Id.* at 1289-90.

As in this case, the officers were, in effect, asking the Court to craft a new exception, then claim qualified immunity because they reasonably relied on this previously-non-existent exception. The officers failed on both counts. Most

tellingly, in *Groh*, this Court rejected qualified immunity, finding that it was patently unreasonable to rely on "an expectation" that the Court would craft a new exception for the officers' conduct.

The same "general facilitation of police investigation and preservation of public order" rationales that were rejected as being insufficient to expand the limits of a *Terry* stop, *see Kolender v. Lawson*, 461 U.S. 352, 367 (1983), are all that are posited here; these certainly fall short of the mark needed to afford immunity in such instances.

d. The Same Conduct Test would promote public confidence by removing the implication that the law condones arbitrary arrest.

The "same conduct" test would serve the societal value of promoting public confidence in the police by respecting the protection from arbitrary arrest. *See e.g., Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (noting the role of public policy concerns in qualified immunity rulings); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 Law & Soc. Inquiry 983, 989 (2000) (observing that "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly."). On the other hand, turning our backs on the normative expectations that have served us so well since the Framing Era would subject us to "the inconstant, uncertain, unknown, arbitrary will" of

the police. John Locke, *The Second Treatise of Government* 126 (Everyman ed. 1993) (1689).[13]

These expectations form the "central concern of the Fourth Amendment," which is "to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895 (1975). Despite this, arbitrariness is at the core of the Petitioners' "rationalization" test. It is hard to imagine that ordinary citizens would feel comforted by knowing that they could be falsely arrested, then denied redress if the police could, after the fact, rationalize the arrest based on unrelated conduct.

One of the clearest examples of the perils of the "anything goes" approach is *Kies v. City of Aurora*, 156 F. Supp.2d 970 (N.D.Ill. 2001). Mrs. Kies saw an officer break up a schoolyard fight by apparently beating one student unconscious. *Id.* at 974. She attempted to find out what was going on, and asked if the boy was all right. *Id.* at 975. She asked the officer why he had hit the boy. *Id.* When she tried to tell the boy to have his mother call her, the officer slapped her in the face. *Id.*

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13. Rather, ignoring the true reason for an arrest is hauntingly reminiscent of the abusive practices that led to the Petition of Right in 1628. Lord Coke condemned the king's orders for arrest of those refusing to pay a "loan" to Charles I as a violation of Magna Carta and the common law, stating that "It is against reason to send a man to prison and not show the cause." Stephen D. White, *Sir Edward Coke and The Grievances of the Commonwealth, 1621-1628*, at 231, 240 (1979) (citing *2 Commons Debates, 1628*, at 100-114 (Robert C. Johnson et al. eds. 1977). Are we now to return to a standard where the *causus* is immaterial?

Several weeks later, the officer swore out a complaint, alleging she had "obstructed" him. 156 F. Supp.2d at 975-76. These charges went to trial, where a judge entered a directed verdict. *Id.* at 976. In a § 1983 action, the officer tried to avoid liability for his atrocious actions by claiming he had probable cause for a litany of crimes, including: obstructing a peace officer, disorderly conduct (apparently for speaking loudly), criminal trespass (apparently for walking on the school sidewalk to check on the beaten lad), and disobeying a police officer (here, claiming he was "directing traffic" when dragging the half-unconscious boy into the school). *Id.* at 984-87. Allowing far-ranging extrapolation of qualified immunity for such unrelated conduct would be in complete derogation of the aims of the Fourth Amendment and the policies of qualified immunity.

Further, there is the specter of affording a shield to officers who engage in racial profiling. *See* Jeffrey Needle, *Driving While Black – DWB*, Trial News 3 (Dec. 1996) ("Young African-American males frequently report being stopped and detained for reasons that are superficially pretextual."). It is not mere speculation to posit that officers would quickly attempt to rationalize an illegal arrest by pointing to minor traffic infractions – infractions that can be found (or invented) in almost every car trip. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 273 ("Since virtually everyone violates traffic laws at least occasionally, . . . police officers, if they are patient, can eventually pull over almost anyone they choose. . . ."); Wesley MacNeil Oliver, *With An Evil Eye and An Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tul. L.Rev. 1409 (2000) (addressing consent decree with New Jersey to stamp out racial profiling).

In short, there is a profound interest in requiring officers to hew a close line. "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . If the government becomes a lawbreaker, it breeds contempt for law . . . ." *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting).[14]

e. The Same Conduct test is consonant with the right to know the cause of the arrest, or the charges against you, at the time of arrest. This right, while somewhat eroded, was embodied in the common law and is still used in many states today.

One of the defining differences between a society based on the rule of law and one based on authoritarian rule is government accountability. Americans have the right to see their government in action, to question, and to challenge its actions. In keeping with that, it has long been the rule that when a warrantless arrest is effected, the officer must inform the arrestee of the officer's authority, and the cause of the arrest; if the arrest is pursuant to a warrant, but the officer does not have the warrant at the time of arrest, "he or she must then inform the defendant of the offense charged and of the fact that a warrant had been issued." *See, e.g., John Bad Elk v. United States*, 177 U.S. 529, 535, n. (1900) (reciting South Dakota law) ("When arresting a person

14. This is not to be confused with "mere" pretextual stops, which this Court has found to be governed by the same objective standard as other stops. *Whren v. United States*, 517 U.S. 806 (1996) (probable cause justifies stop regardless of officer's motivation). *Cf State v. Ladsen*, 979 P.2d 833 (Wash. 1999) (prohibiting pretextual stops under Washington state constitution).

without a warrant, the officer must inform him of his authority and the cause of the arrest . . ." and "He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit. . . ."); 5 Am.Jur.2d Arrest § 94 ("One who arrests without a warrant must generally inform the arrested person of the object and cause of his arrest."); JA 145 (officer stating "You have to inform them and be sure that they understand that they are under arrest.")

This has even been held to apply to the warrant of arrest itself. *See United States v. Salliey*, 360 F.2d 699 (4th Cir. 1966); *State v. Riley*, 846 P.2d 1365 (Wash. 1993) (holding that the crime must be stated with specificity in order to place limits on the warrant); 1 Fed. Prac. & Proc. Crim 3d § 55 (Wright & Miller) (addressing statement of charge); 5 Am.Jur.2d Arrest § 27 ("The arrest warrant must contain sufficient information to notify the defendant of the nature of the crime charged.").

This doctrine maintains its vigor to this day. *See, e.g.* Iowa Code § 804.14 (requiring that "the reason for the arrest" be stated at the time of arrest); *Green v. State*, 525 S.E.2d 154, 158 (Ga. App. 1999) (similar requirement); Tex.Code Crim. Proc. Ann. § 15.26 (West Supp. 2004) (stating "If the officer does not have the warrant in his possession at the time of arrest he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued."); *Williams v. Lee County Sheriff's Dept.*, 744 So.2d 286, 294-95 (Miss. 1999) (addressing requirement that officer inform an accused of the "object and cause of the arrest without a warrant."); Oregon Revised Stat. § 133.235 (same); Florida Stat. Ann. § 901.17; Ohio Rev. Code § 2935.07 (same); Idaho Code § 19-608 (requiring officer to inform the person of the "reason for the arrest"); *Roberts v. State,*

711 P.2d 1131, 1136 (Wyo. 1985) (stating that "The rule recognizes that people ought to know why they are being arrested."); New York Criminal Procedure Law § 140.15 ("The arresting police officer must inform such person of his authority and purpose and of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical.") Utah Code Ann. § 77-7-6 (same); *United States v. Kole*, 164 F.3d 164 (3rd Cir. 1998) (addressing Philippines law).

It is utterly incongruous to impose a higher standard for arrest made pursuant to a warrant than on those made solely at the instance of an exercise of authority that was so mistrusted at common law. *See also Groh v. Ramirez*, 124 S. Ct. 1284, 1292 (2004) (finding similar requirement for search warrant to be inherent in the "reasonableness" standard).

Only the "same conduct" test comports with the traditional notions of fairness that are inherent in this doctrine. The arrestee is given notice, at the time of arrest, of the conduct that formed the basis for his arrest, thereby affording him the ability to challenge a patently unlawful arrest, arrange for a lawyer, etc. Allowing the after-the-fact extrapolation proposed by Devenpeck is clearly at odds with this.

f. Allowing police to find potentially unlawful conduct after the fact of an unlawful arrest runs counter to the time-honored right of a citizen to resist an unlawful arrest.

We are adjured to look to the past, as the Fourth Amendment should not be construed in such a way as to provide *less* protection that was available at common law. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (asserting "the first principle of the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded"). Adoption of anything broader than the "same conduct" test would run counter to another common law tradition – the ability to resist an unlawful arrest. *See generally* Davies, 98 Mich. L. Rev. at 625.

This right was recognized three hundred years ago most famously in *Regina v. Tooley*, 2 Ld.Raym. 1296, 92 Eng. Rep. 349, 351-52 (Queen's Bench 1710). In *Tooley*, the court mitigated murder to manslaughter in a case involving the killing of a constable while effecting an unlawful arrest, stating that "where the liberty of the subject is invaded, it is a provocation to all the subjects of England," and "offensive to the Magna Charta." 92 Eng.Rep. at 352-53. This right to resist was imported into American common law. *See, e.g., Brown v. United States*, 159 U.S. 100 (1895); *Commonwealth v. Kennard*, 25 Mass. (8 Pick.) 133, 134-36 (1829); *State v. Bowen*, 234 P. 46 (Kan. 1925); *City of Columbus v. Holmes*, 152 N.E.2d 301 (Ohio 1958), *aff'd per curiam*, 159 N.E.2d 232 (1959).

As this Court stated, "If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." *John Bad Elk v. United States*, 177 U.S. 529, 534-35 (1900); *See also United States v. Di Re*, 332 U.S. 581 (1948) ("One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.").

As late as 1966, 45 states recognized this "arrest rule." Max Hochanadel & Harry W. Stege, Note, *Criminal Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?*, 3 Tulsa L.J. 40, 46 (1966). By 1997, the rule was still vital in 20 states. *See* Adam P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 Drake L. Rev. 383, 387-88 & n.49 (1998) (collecting statutes and cases). Even in states that have modified this rule, resistance is *still* authorized when death or injury is likely in submitting to an unlawful arrest. *State v. Garcia*, 27 P.3d 1225 (Wash. App. 2001) (addressing modified "arrest rule").

Adopting the "rationalization" test would subject a citizen who exercises his or her right to resist "obvious injustice" to the possibility that, years after the fact, some malevolent scrivener could, by poring over yellowing police reports, find some other crime that *could have* served as the basis for the arrest, and file charges accordingly, thereby exposing the arrestee to criminal liability for obstruction or battery for resisting what was, on its face, an unlawful deprivation of liberty.[15]

15. The justification for this hoary right prove its vitality even today. As Aleksandr Solzhenitsyn wrote, had resistance begun "at the moment of the arrest itself," the Stalinist machine "would have ground to a halt." Aleksandr Solzhenitsyn, *The Gulag Archipelago*, at 15 (English Ed. 1973).

g. This Court's precedent under Fifth and Sixth Amendment jurisprudence show that separate occurrences are just that – separate.

The "same conduct" test is in accord with this Court's rulings in other areas of the law – namely, Miranda and the right to counsel. Most recently, in addressing whether Miranda rights had been observed, this Court distinguished between contact at the suspect's home and more in-depth questioning at the police station, stating that a reasonable person would realizes that it was "a new and distinct experience" *Missouri v. Seibert*, 529 U.S. at 14 (slip opinion) (citing *Oregon v. Elstad*, 470 U.S. 298 (1985). There is no principled reason to allow qualified immunity to flow between "distinct experience[s]" when Miranda rights generally do not.[16]

This same ability, and willingness, to delineate between events was shown in *Texas v. Cobb*, in which the Court held that the right to counsel under the Sixth Amendment is implicated on for the same offense, refusing to expand it even to related offenses unless they are identical under the *Blockburger* test. 532 U.S. 162 (2001); *Blockburger v. United States*, 284 U.S. 299 (1932). This same standard underlies double jeopardy precedent. *See Brown v. Ohio*, 432 U.S. 161 (1977). The "same conduct" test harmonizes well with those.

16. In *Seibert*, the Court found that the unwarned confession in the station house followed by a warned confession did *not* meet this "distinct experience" standard. *Id.*

h. Allowing ex-post-factor rationalization would increase litigation, and blur the bright lines between lawful, and unlawful, arrests.

Additionally, rather than clarifying the rules, allowing ex-post-facto searches through unrelated conduct would serve to obfuscate them. This Court has repeatedly stressed the need for "a clear rule, readily understood by police officers," *Thornton v. United States*, 124 S. Ct. 2127, 2133 (2004), that is "easily applied, and predictably enforced." *New York v. Belton*, 453 U.S. 454, 459 (1981). Indeed, this Court has eschewed rules that are "qualified by all sorts of ifs, and, and buts." *Belton*, 453 U.S. at 458.

Here, there is an institutional benefit to be gained by imposing a bright-line rule limiting the focus of inquiry to the same conduct. By delimiting the inquiry to an objective assessment of the conduct for which the person was arrested, there is no need to engage in "hair-splitting distinctions." *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring).

Conversely, the "anything goes" test proposed by the Petitioners is similar in application to the "sensitive," case-by-case analysis proposed, and rejected, in *Atwater v. City of Lago Vista*, in favor of more "readily administrable rules," such as the "same conduct" test. 532 U.S. 318, 347 (2001). Much like in *Atwater*, while the case-by-case analysis suggested by the Petitioner in that case has a superficial appeal that seems to "respect the values of clarity and simplicity," in reality it would unduly complicate police work by injecting an element of uncertainty into the analysis, making it hinge on the outcome of a belated liability review

and legal analysis completely disconnected from the events on the scene. *See Atwater,* 532 U.S. at 347-348 (noting with disapproval prospect of adopting rule that hinges on "judicial second-guessing months and years after an arrest or search is made"); *Scott v. United States*, 436 U.S. 128, 135 (1978) (noting that post-hoc explanations are "prepared after the fact by a Government attorney and us[e] terminology and categories which were not indicative of the agents' thinking at the time. . . .") *See generally* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 Ind. L.J. 419 (2002).

Since roadside arrests are "frequently recurring," *Thornton v. United States*, 124 S. Ct. 2127, 2134 (2004) (Scalia, J., concurring), there is a profound interest in adopting an approach that streamlines, rather than attenuates, the analysis. Thus, the Court should eschew the rationalization approach for the "readily administrable" same conduct test.

i. Allowing the rationalization test would undermine the interests in suppressing the fruits of unlawful searches and seizures.

The leading Vermont case shows another problem inherent in the "anything goes" approach – namely, its use to justify the fruits of an illegal search. In *State v. Hollis*, police stopped a vehicle based on a tip that the driver was transporting cocaine. 633 A.2d 1362, 1363 (Vt. 1993). A records check showed the driver's license was suspended. *Id.* Although the officer did not arrest the driver for DLS, he conducted a vehicle search and found marijuana. *Id.* The officer then announced that the driver was being cited

for driving on a suspended license, and arrested for possession of marijuana. *Id.* At the station, an officer found a baggie of cocaine in the room with the waiting defendant, who was charged with possession of cocaine, marijuana, and DLS. *Id.*

Noting that "the arresting officer was aware that defendant had been operating a vehicle with a suspended license but chose not to arrest him on that charge," the Court found that the search of the vehicle was unlawful, as it was not incident to arrest. 633 A.2d at 1366. In applying the "same conduct" test, the Court observed that adopting the "could have" reasoning would "break the causal link" between the unlawful search and the subsequently discovered evidence, allowing evidence that was clearly seized unlawfully to nevertheless be admitted. Finding this to be anathemic to the deterrent purposes of the exclusionary rule, the Vermont Supreme Court upheld the suppression order. *Id.* at 1367.

j. This standard does not do a disservice to the (obviously) important societal goal of crime prevention.

The same conduct test does not represent a triumph of form over substance. It does not impose liability for mere clerical errors or technical imprecision in booking. *See Florida v. Royer,* 460 U.S. 491, 507 (1983) (plurality opinion); *Sibron v. New York,* 392 U.S. 40, 66-67 (1968). Instead, it allows "some latitude for honest mistakes," *see Maryland v. Garrison*, 480 U.S. 79, 87 (1987), by allowing qualified immunity even if the officer was wrong about the name or characterization of the predicate conduct. Several cases make this point eminently clear.

In North Dakota, an arrest for driving with an open container was held lawful based on the "same conduct" test. *State v. Smith*, 452 N.W.2d 86 (N.D. 1990). In that case, the police officer saw man with what appeared to be open beer bottle, but did not see him driving. *Id.* at 87. The officer drove to where the man had been standing outside his car, and found a cold beer bottle on the ground. *Id.* He then stopped the car for an "open container" violation, and saw numerous weapons in plain view (Smith was a felon, and not allowed to possess firearms). *Id.* In addressing whether the officer had reasonable suspicion to stop the car, the North Dakota Supreme Court approved the stop, noting that the empty bottle justified a citation for improper disposal (and, thus, a stop), and that the offenses "are related because they arise from the same set of factual circumstances." *Id.* at 89-90.

Likewise, *Ochana v. Flores* shows the proper balancing. In that case, police responded to a call and found Ochana unresponsive and in a stupor, with his car running, stopped at a traffic signal in Chicago. 199 F. Supp.2d 817, 823 (N.D. Ill. 2002). A bag with white powder was seen sticking from a backpack and a bottle that appeared to have an altered prescription. *Id.* at 824. He was charged with obstructing traffic, possession of a controlled substance, and altering a prescription. The latter two charges were dismissed after testing showed no illegal drugs. *Id.*

In a § 1983 action challenging the arrest, the district court found that there was probable cause to arrest Ochana for the closely-related crimes of driving under the influence, reckless driving, and negligent driving, as

> [a]ll three of these charges could reasonably be based on the same set of facts – that Ochana was

> asleep or unconscious at the wheel of his car, while at a stoplight in front of a line of traffic, with the gear of his car in drive and his foot on the brake – that gave rise to the arrest.

199 F. Supp.2d at 827, 833-34. *See also Price v. City of Westland*, 1995 WL 871202 (E.D. Mich) (finding qualified immunity in prosecutions for spousal abuse of two men because, even though old ordinance had been amended, the "hitting, biting and chasing" of one wife and running over the legs of the other "with a heavy piece of machinery" still violated the new ordinance and the state statute).

Additionally, in an Arkansas case involving an arrest for "horseback DUI," while agreeing that a person riding a horse could not reasonably be arrested for DUI, the Arkansas High Court found that probable cause did exist for the offense of public intoxication, which, likewise, arose from the same conduct. *Baldridge v. Cordes*, 85 S.W.3d 511, 516-17 (Ark. 2002); *See also Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001) (finding obstruction of justice and failure to follow police rules were based on same facts in arrest of suspended police officer); *Parker v. Swansea*, 270 F. Supp.2d 92 (D.Mass. 2003) (finding qualified immunity in malicious prosecution claim due to "related offense" doctrine).

All told, it is evident that the societal benefits conferred by any expansion do not outweigh the costs "in terms of unremedied meritorious claims," *Crawford-El*, 523 U.S. at 1600-01 (Rehnquist, C.J., dissenting), and that the approach used by the Ninth Circuit is reasonable, appropriate, and constitutional.

C. *The law was clearly established that the Ninth Circuit would find the extrapolation of probable cause from unrelated conduct to be objectively unreasonable, and decline to accord qualified immunity.*

If the law is clearly established, qualified immunity normally fails, as a reasonably competent public official should know the law. *Harlow*, 457 U.S. at 818-19. "The entire jurisprudence of qualified immunity is premised on the proposition that well-trained, competent police officers will be aware of what constitutional rights have been established." *Henderson v. Mojave County,* 54 F.3d 592 (9th Cir. 1995).[17]

The question of whether the law is clearly established is a "pure question of law for the court to decide." *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). The law need only be sufficiently clear that "a reasonable official would understand that what he is doing violates that right," that is, that he is given "fair warning" of the rights. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "The determination whether the facts alleged could support a reasonable belief in the existence of probable cause or reasonable suspicion is also a question of law to be determined by the court." *Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir. 1993).

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17. *See, e.g., Gaines v. McGraw,* 445 F.2d 393 (5th Cir. 1971) imposing liability on police officers stating,

> The officers undertook to arrest the appellant for something that was not a crime, which was not described in the statute to be a crime, by an ordinary reading of the language, and which the Supreme Court of the State of Alabama had almost in *haec verba* with the facts testified to here determined was not a crime.

The right not to be arrested or prosecuted without probable cause has, of course, long been a clearly established constitutional right. *Dunaway v. New York*, 442 U.S. 200 (1979). "It is now far too late in our constitutional history to deny that a person has a clearly established right not to be arrested without probable cause." *Cook v. Sheldon*, 41 F.3d 73, 78 (2d Cir. 1994).[18] It was also clear that the Ninth Circuit would not allow rationalization of an unlawful arrest by looking to unrelated conduct.

1. *Sources of law.*

In the Ninth Circuit, the inquiry begins by looking to binding precedent. *See Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985). If the right is clearly established by decisional authority of the Supreme Court or the Circuit, the inquiry should come to an end. On the other hand, when "there are relatively few cases on point, and none of them are binding," the inquiry becomes whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results. *See id.* at 1515. Thus, in the absence of binding precedent, the court must look to "whatever decisional law is available to ascertain whether the law is clearly established" for qualified immunity purposes, "including decisions of state courts, other circuits, and district courts." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995); *see also Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996) (reiterating standard).

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18. This is well within the level of specificity needed to put the officers on notice of the lines they should not cross. *See generally Anderson*, 483 U.S. at 639-41 (addressing level of generality for identifying clearly established rights).

As Judge Posner has stated it,

> The fact that a statute has not been construed does not mean that there is no law, that anything goes. . . . The clearest violations may never generate an appeal, just because there is no nonfrivolous ground for an appeal; and without an appeal there will be no authoritative judicial interpretation of the statute. It would be a considerable paradox to say that public officers have a license to commit statutory violations so outlandish that they have never been the subject of a published appellate decision. . . . Suppose that the defendants had arrested [the plaintiff] for the possession of property given to him by his mother, on the theory that since mothers are notoriously soft-hearted any 'gift' from mother to son is actually a theft by the son. . . . No reported case . . . has ever addressed this imaginative theory.

Northern v. City of Chicago, 126 F.3d 1024, 1028 (7th Cir. 1997) (Posner, C.J.).

Thus,

> the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established. . . . Indeed, it stands to reason that in many instances 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue on the part of government actors.

Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 251 (2d Cir. 2001), quoting *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994). Cf., *Sh.A. v. Tucumcari Municipal Schools*, 321 F.3d 1285, 1288 (10th Cir. 2003).

2. *The Court of Appeals properly found that the law was clearly established that an on-duty traffic stop on a public highway was not, in any sense, a "private conversation."*

The Washington Privacy Act prohibits, *inter alia,* the recording of any "private communication" or "private conversation" without the consent of all parties. RCW 9.73.030(1)(a) & (b).[19] *See also Kadoranian v. Bellingham Police Dep't.*, 829 P.2d 1061 (Wash. 1992). The statute is "designed to protect private conversations from governmental intrusion," *State v. Clark,* 916 P.2d 384, 393 (Wash. 1996), and "reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement." *State v. Fjermestad,* 791 P.2d 897, 902 (Wash. 1990). Washington courts have held that if a conversation is

19. RCW 9.73.030 provides: (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication; (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

not private, then any recording falls "outside the purview of the statute." *State v. D.J.W.,* 882 P.2d 1199, 1202 (Wash. Ct. App. 1994).

Washington's definition of a "private communication" is common sense itself. In *State v. Faford,* the Washington Supreme Court interpreted a private communication as one that is "secret," "not open or in public." 910 P.2d 447 (Wash. 1996). In keeping with that common-sense definition, the Court of Appeals held in *State v. Slemmer* that recording a public meeting at which minutes were taken was inherently not private. 738 P.2d 281, 285 (Wash. Ct. App. 1987), *impliedly overruled on other grounds, State v. Frohs*, 924 P.2d 384 (Wash. Ct. App. 1996). Other actions that have been found not to have any expectation of privacy are: phone calls, *State v. Faford*, 910 P.2d 447 (Wash. 1996) (expectation of privacy in use of cordless phone), telephone calls made to a police dispatcher, and even telephone calls that are accidentally answered by the police. *Washington v. Gonzales*, 900 P.2d 564 (Wash. Ct. App. 1995). The standard applied throughout is the same "reasonable expectation of privacy" that informs Fourth Amendment jurisprudence. *State v. Bonilla,* 598 P.2d 783 (Wash. Ct. App. 1979).

Washington has also firmly squashed any attempt by the government to use the Privacy Act against its own citizens, most notably in *State v. Flora,* 845 P.2d 1355 (Wash. Ct. App. 1992), in which Flora was arrested for secretly taping police who were investigating an allegation of violating a restraining order. 845 P.2d at 1355-56.

On appeal, however, the Court of Appeals was blunt – the officers had no expectation of privacy. 845 P.2d at 1357. In fact, the Court stated:

> The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.

Id. The Court continued, stating that there was "no persuasive basis" for according a privacy interest to law enforcement officers, and chastised the State for urging the Court to effectively "distort the rationale" of the Privacy Act and the case law interpreting it. *Id.*

This holding was cited with approval by the Washington Supreme Court in *State v. Clark,* in which the Court observed, in reviewing case law on the Privacy Act, "The officers in *Flora* had **no personal privacy interest** in statements made as public officers effectuating an arrest in public." 916 P.2d at 393 (emphasis added).

This same result was reached by the United States District Court for the Western District of Washington in *Fordyce v. Seattle,* 907 F. Supp. 1446 (W.D. Wa. 1995). Fordyce was arrested for videotaping part of a public demonstration in Seattle in 1990. *Id.* He sued, claiming that his arrest for violating the Privacy Act was improper. *Id.*

The Ninth Circuit found that the law on the state Privacy Act was "uncertain" in 1992, and found qualified immunity.

Fordyce v. Seattle, 55 F.3d 436 (9th Cir. 1995). On remand, the District Court issued declaratory relief reiterating that the Privacy Act does not criminalize recording audible conversations in a public street with a readily apparent device. 907 F. Supp. at 1448.

The undisputed facts put Mr. Alford's case squarely on all fours with the above opinions. As in *Flora*, the recording (and the interaction with the officers) took place on a public road, open to the eyes and ears of all passersby. 845 P.2d at 1356; JA 113, 124.

Even aside from the *Flora* opinion, the Court of Appeals correctly noted that no reasonable person believes that a police officer's interaction with the public is in any sense "private." They are public servants performing a public function with members of the public in public. The officers admitted to testifying in court about what transpires, and what is said, at traffic stops. JA 125-26. Likewise, there is no reasonable expectation of privacy in anything that is done in full view (and earshot) of the public. This point was made quite bluntly by the Washington Supreme Court in the *Clark* opinion, in which it stated that there was no expectation of privacy in anything done "in plain view and potentially within sight or hearing of anyone who might have passed by." 916 P.2d at 394.

As the Washington Supreme Court stated in *State v. Clark,* "a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private." 916 P.2d at 392. Based on this, there was no principled reason for Devenpeck to believe that he had any protection under the Privacy Act.

Since *Flora* was decided in 1992, and *Fordyce* in 1995, the law was clearly established that RCW 9.73.030 does not prohibit taping of police officers in a situation such as the present one. It was also clearly established that a person could not be criminally arrested, nor charged, nor incarcerated for violating RCW 9.73.030 for such conduct.[20]

Additionally, the law was clearly established that probable cause could not be established by an erroneous understanding of the law. While an officer may have reasonable suspicion or probable cause even where his reasonable understanding of the facts turns out to be mistaken, *see, e.g.*, *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001), courts have repeatedly held that a mistake about the law cannot justify a stop, let alone an arrest, under the Fourth Amendment. *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding that officer had no reasonable suspicion for traffic stop where driver "simply was not" violating any law); *accord United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002); *King*, 244 F.3d at 739; *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000); *cf. United States v. Wallace*, 213 F.3d 1216, 1220-21 (9th Cir. 2000) (suggesting that no probable cause would exist in "cases in which the defendant's conduct does not in any way, shape or form constitute a crime").

As the Ninth Circuit explained in *Mariscal*: "If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his

20. *See also Dasey v. Anderson*, 304 F.3d 148 (1st Cir. 2002) (activity in the presence of others who owe no duty of confidentiality is hardly "private.")

imaginings cannot be used against the [suspect]." 285 F.3d at 1130. Those words are strangely echoed by the testimony of one of the officers in this case, who stated "Well, since the arrest we've been given the case statute [sic] and the way it's read, apparently he can do it." JA 130.[21] The officers knew, and admitted, the conduct for which Mr. Alford was arrested. JA 144, 163 (admitting that the real reason for the arrest was not the recording, but that "He was clandestinely recording the conversation"); 174 (stating that the decision to arrest was made "When I observed the tape recorder.") Just because they may be liable for that decision does not make the law unclear, nor does it entitle them to qualified immunity.

3. *The Ninth Circuit affirmatively adopted the closely-related offense rule in the Gasho case, making the law clearly established that unrelated conduct cannot supply missing probable cause.*

It is beyond peradventure that the Ninth Circuit adopted the closely related offense rule, and that this was the binding law in this Circuit at the time of Mr. Alford's unlawful arrest.

In *Gasho*, a couple sold their DC-3 to a Canadian corporation, and had changed its marking preparant to flying

21. Amicus United States strays far afield from the questions on which certiorari was granted, arguing the bona fides of Mr. Alford's arrest under a hypothetical construct that ignores the closely-related offense doctrine. (Brief of U.S. at 24-26) These contentions were not presented in the petition for certiorari, are not properly before the Court, and are not addressed here. *See* Supreme Court Rule 14.1(a); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999); *Meyer v. Holley*, 537 U.S. 280, 291 (2003).

it to Canada. *Gasho v. United States*, 39 F.3d 1420 (1994), *cert. denied*, 515 U.S. 1144 (1995). An FAA inspector had approved this. 39 F.3d at 1425-26. Customs agents seized the plane for "misleading" markings, but allowed Mrs. Gasho to remove the logbooks. *Id.* at 1426. Despite this, the agents then arrested the Gashos for "unlawful removal of property from Customs custody." *Id.*

In their subsequent *Bivens* action, it turned out that one reason the couple was arrested was because, as one officer put it, their refusal to turn over the logbooks "made us mad." 39 F.3d at 1427.[22] The Court of Appeals found that qualified immunity did not lie, and reversed summary judgment. *Id.* at 1438-39. In reviewing the government's claim that probable cause existed, the Court of Appeals specifically adopted, and applied, the "closely related offense" doctrine, adopting the rationale of *United States v. Rambo*, 789 F.2d 1289 (8th Cir. 1986). 39 F.3d at 1428 n.6. In its analysis, the Court specifically pointed out that "Here . . . the United States is citing a closely related offense for the *same* conduct by the arrestee." *Id.* Thus, the use of the doctrine was not mere *obiter dictum*, but was essential to the holding, and analysis,

22. This "contempt of cop" theme further underscores that no policy underlying qualified immunity is served by granting immunity in these instances. *Compare Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.") *and Funnye v. Paragon Sporting Goods Co., LLC*, 2001 WL 300740 *3 (S.D.N.Y.) (when man asked for paper to write down badge numbers of investigating officers, officer immediately decided to arrest him). *See also Kies v. City of Aurora*, 156 F. Supp.2d 970 (N.D.Ill. 2001) (woman arrested after questioning why officer beat student to break up fight).

in the case. Thus, the "binding precedent" element was present, making the law clearly established.

This has been followed as precedent in this Circuit. In another case decided in the Ninth Circuit, a district court refused to retroactively justify an arrest for manufacturing methamphetamine "by the possible existence of probable cause to arrest" for an unconnected possession of a police baton. *Puliafico v. County of San Bernardino*, 42 F. Supp.3d 1000, 1012 (C.D. Cal. 1999). As the court noted, "The problem with this argument is that plaintiff was unequivocally not arrested for that (assumed) offense." *Id.* at 1017. Citing the "modern rule" as iterated in *Gasho*, *supra*, the court found that the baton-possession offense was "completely separate" from the predicate offense, and "cannot justify" the arrest. *Id.*; *see Seibert*, 529 U.S. at 14 (adopting "separate incidents" analysis)

Based on the clear language of *Gasho*, and the ease with which Ninth Circuit courts have addressed its treatment of the closely-related offense doctrine as binding precedent, it strains reason to claim that Devenpeck was not on notice of the boundaries of qualified immunity in the Ninth Circuit.

Further, although headnotes are not part of the opinion, they certainly should be considered in determining the notice given to the world. In the *Gasho* case, the headnote reads "Probable cause may exist for closely related offense, even if that offense was not invoked by arresting officer, as long as it involves the same conduct for which the suspect was arrested. . . ." 39 F.3d 1420, n.7.

This is in sharp contrast to the situation regarding media ride-alongs that was addressed in *Wilson v. Layne*. 526 U.S.

603 (1999). In *Wilson*, officers allowed a Washington Post reporter to accompany the execution of an arrest warrant. *Id.* at 607-08. While holding that this ride-along *was* a violation of the Fourth Amendment, the Court allowed qualified immunity to the officers, with the issue turning on whether the law was "clearly established" that such media ride-alongs would violate the Fourth Amendment. 526 U.S. at 614-16. This decision was compelled by the dearth of authority on the issue – there was no controlling authority from the relevant jurisdiction, there was no consensus of persuasive authority, there was, in fact, only one published opinion (from another state), and that actually *approved* of the practice. *Id.* at 616. Given this "undeveloped" state of the law, it is small wonder that it was not unreasonable for the police to believe the ride-along was lawful. *Id.* at 617. [23] That is simply not the case here.

Although Petitioners attempt to make much of several states that have failed to follow the federal precedents, this straw man is easily disposed of. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it is irrelevant if state law purports to allow actions that are violative of federal rights; "The question in this Court upon review of a state-approved search or seizure 'is not whether the search (or seizure) was authorized by state law. The question is rather whether the

23. Amazingly, Amicus National League of Cities misrepresents this holding as a "determination . . . that a conflict among appellate courts *establishes conclusively* that a legal issue is *not* clearly established." NLC Brief at 18 (emphasis supplied). That is certainly not the holding of *Wilson*, which had *no* controlling authority from the relevant jurisdiction, and is not relevant to the issues in this case, where the Ninth Circuit had already adopted the "same conduct" test in clear terms.

search (or seizure) was reasonable under the Fourth Amendment.'" *Sibron*, 392 U.S. at 60-61.

This principle (which is at the heart of federalism) was echoed in *Elkins v. United States*, in which the Court concluded that "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. 206, 224 (1960). To put it bluntly, the Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular state in which [it] occurs." *California v. Greenwood*, 486 U.S. 35, 43 (1988); *Bergstralh v. Lowe*, 504 F.2d 1276, 1277 (9th Cir. 1974) (lawfulness of arrest does not use state law if that law is "inconsistent with the federal Constitution"). *See Wilson*, 526 U.S. at 623 (Stevens, J., concurring in part and dissenting in part).

Thus, while Washington "is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement," *Sibron*, 392 U.S. at 60-61, it may not, in so doing, trench upon the Fourth Amendment protections as iterated by the Supreme Court, or the applicable federal Circuit.

CONCLUSION

This case does not tread on the "unsettled margins" of the Fourth Amendment – it implicates the core protections of freedom from unlawful and arbitrary arrest.

As one member of the Washington Supreme Court observed, there is no legitimate reason to "privilege[] government agents in the wrong to the prejudice of citizens in the right," as doing so would mean that "[I]n a society of equals, those who violate their public trust by stepping beyond the boundaries of their lawful authority are privileged to become the usurping masters of the public they were originally entrusted to serve." *Valentine v. State*, 935 P.2d at 1307 (Sanders, J. dissenting).

In this instance, the normative balance is struck only by validating the approach of the Ninth Circuit to impose common-sense limits on the ability of law enforcement to rely on unconnected conduct to validate an unlawful arrest. Given that the rules on qualified immunity laid down by this Court apply across many classes of plaintiffs and many types of damages actions, the expansion proposed by Petitioners herein is unwarranted, and potentially fatal to the vindication of fundamental rights. *See Butz v. Economou*, 438 U.S. 478, 500-04 (1978); *Crawford-El*, 523 U.S. at 585. Accordingly, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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NO. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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A. The "Closely Related Offense Doctrine" Is Not Grounded In Fourth Amendment Jurisprudence Or Sound Social Policy

"[T]he totality of the circumstances analysis traditionally . . . has informed probable cause determinations". *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It is an objective inquiry asking whether "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Respondent Alford seeks to undercut the objective nature of the probable cause inquiry and significantly restrict its scope through the "closely related offense doctrine". Alford and his amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), variably describe the doctrine as the offense articulated by the officer at arrest; the same conduct; or what NACDL dubs "the true grounds" for arrest. Resp't Br. at 7; NACDL Br. at 2.[1] Application of the doctrine would limit the facts and circumstances that may be considered in determining whether an arrest was reasonable. Thus, probable cause would be defined far more narrowly than under the Court's longstanding analytical framework. Nothing in the Court's Fourth Amendment jurisprudence or sound public policy supports such a drastic change in course.

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[1] Alford's and NACDL's different articulations of the "closely related offense doctrine" only reinforce the unrefuted point made by the United States that the "closely related offense doctrine" is neither uniform in its scope nor consistent in its consequences. U.S. Br. at 16-19.

1. The "Closely Related Offense Doctrine" Injects Subjective Judgments Into The Probable Cause Determination

All parties and amici curiae in this case agree—as they must—that probable cause under the Fourth Amendment is an objective inquiry asking whether, at the moment of arrest, the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense. *Beck*, 379 U.S. at 91. Alford and NACDL make two arguments to shoehorn the "closely related offense doctrine" into this objective standard.

First, Alford and NACDL argue that the "closely related offense doctrine" is, in fact, an objective standard. They characterize the officer's articulation of an offense—or where none is articulated, "the true grounds" for arrest—as objective. Resp't Br. at 8-9; NACDL Br. at 2, 14-15. But this characterization fails. When officers articulate an offense in connection with arrest, their statement represents the officers' subjective legal evaluation of the facts and circumstances known at the time of arrest. The officers' articulation is nothing more than the subjective exercise of on-scene discretion. The officers' subjective belief that there is or is not probable cause to arrest for a specific offense may be wrong. The officers may have a subjective belief that there is probable cause to arrest for a number of offenses, but may choose to articulate what they believe is the most serious. Each of these possibilities is based on the subjective judgment of the arresting officers.

In arguing that an articulated offense is objective, Alford and NACDL confuse the exercise of proving what the officers articulated at arrest, with the thought process of the officers that led to the articulation. That one may objectively prove what the officers said at the time of the arrest does not make the articulation itself objective. It is subjective—based on the officers' best judgment of the facts and circumstances known at the time of arrest.

The facts of this case provide a striking example of the subjective nature of the offense articulated at arrest. Imagine that a second motorist engaged in precisely the same conduct as Alford, but was stopped by a different officer. Unlike the petitioners, that officer decided to arrest the second motorist for impersonating an officer, instead of a violation of the Privacy Act. Although the objective facts and circumstances at the time of arrest are precisely the same in both cases, the result would be different under Alford's theory. Under the "closely related offense doctrine", the arrest of the second motorist would be valid; Alford's arrest would be invalid. The only difference in the two situations is the subjective judgment of the officers involved—judgment that the "closely related offense doctrine" makes determinative of probable cause.

NACDL's second argument is that the Court's rejection of the subjective standard only encompasses the motivation of the officers for making the arrest. NACDL Br. at 4-7. NACDL relies on *Whren v. United States*, 517 U.S. 806 (1996), to support this claim. It is true that *Whren* involved a claim that the traffic stop at issue was a mere pretext to search

for drugs. However, nothing in *Whren* limits the Court's rejection of the subjective standard to claims that the arresting officer's motive was improper. Indeed, the Court emphasized that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent". *Whren*, 517 U.S. at 814. *Whren* supported this statement with examples that did not involve the officer's motivation for making the arrest. *Id.* ("See, *e.g.*, *Robinson*, *supra*, at 236, 94 S. Ct., at 477 ('Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that the officer did not indicate any subjective fear of the arrestee or that he did not himself suspect that the arrestee was armed') (footnotes omitted)"). The Court's objective reasonableness standard precludes all subjective evaluation of the arrest—not just the officer's subjective motive for making the arrest.

As demonstrated in petitioners' opening brief, and further discussed below, a subjective inquiry is inconsistent with the probable cause determination established by the Court, but it is integral to the "closely related offense doctrine".

2. The "Closely Related Offense Doctrine" Does Not Work And Leads To Irrational Results

The "closely related offense doctrine" depends upon officers articulating the basis of the arrest. Without this articulation, there is no way to determine whether the articulated offense is closely related to another offense. Yet there is no constitutional requirement that an officer articulate

the basis for an arrest at the time of arrest. And in some circumstances, it is not practical or possible to articulate the basis for arrest.

Although it is doubtless good practice to explain to suspects why they are being arrested, the Fourth Amendment does not require it.[2] *Kladis v. Brezek*, 823 F.2d 1014, 1018 (7th Cir. 1987) ("We conclude that . . . the Fourth Amendment [does not] provide [the defendant] the right to be informed of the reason for his arrest . . . [T]he Fourth Amendment requires only that the police have probable cause to believe that an individual has broken the law before arresting him or her."); *Williams v. Scharlo*, 93 F.3d 527, 529 (8th Cir. 1996).[3] Rather than requiring an officer to explain to suspects why they are being arrested, the Fourth Amendment requires that states "must provide a fair

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[2] Alford argues that officers are required to articulate the basis of arrest. Resp't Br. at 22-24. All of the decisions cited by Alford involve statutes or court rules that impose a requirement to inform a suspect of the grounds for arrest. However, none of the decisions hold that the Fourth Amendment requires an officer to articulate the basis for arrest.

[3] The Sixth Amendment of the United States Constitution does provide that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation". The Sixth Amendment's rights to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant". *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Likewise, the right to be informed of the nature and cause of the accusation "does not come into play until the government has committed itself to prosecution". *Kladis*, 823 F.2d at 1018. *Burchett v. Kiefer*, 310 F.3d 937, 947 (6th Cir. 2002).

and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or *promptly* after arrest". *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

In addition, there are situations when, as a practical matter, officers cannot articulate the basis for an arrest because they do not believe that an arrest has taken place. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), officers suspected the defendant was transporting narcotics. The officers thought detaining the defendant was permissible under *Terry v. Ohio*, 392 U.S. 1 (1968). However, a plurality of the Court concluded that what began as a *Terry* stop, became an arrest. *Royer*, 460 U.S. at 502 ("the detention to which [the defendant] was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity"). Thus, as "a practical matter, [the defendant] was under arrest". *Id.* at 503. The officers did not articulate the basis for the arrest, because they did not realize the defendant had been arrested. Despite this fact, the plurality concluded "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Id.* at 507.

Another situation where officers likely will not articulate the basis for probable cause is when an officer disables a fleeing suspect. For example, in *Tennessee v. Garner*, 471 U.S. 1 (1985), an officer

shot and killed a fleeing suspect. The Court held that "the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment". *Garner*, 471 U.S. at 7. But when the officer shot the fleeing suspect, he did not articulate the basis for probable cause necessary to meet the reasonableness requirement of the Fourth Amendment. In both *Royer* and *Garner*, the Court ultimately held that there was no probable cause for the arrest or the shooting. In both cases, the Court looked at the facts and circumstances known to the officers at the time. The Court did not limit its review because the officers did not articulate the basis of the seizure.

The "closely related offense doctrine" simply does not work in these circumstances.[4] That is because the doctrine first requires one to ascertain the offense for which probable cause was lacking and then ask whether the same conduct provides probable cause for arrest on a "closely related offense". When no offense is articulated at arrest, no touchstone exists for answering this question. The

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[4] Application of the "closely related offense doctrine" will also likely lead to two outcomes—neither of which is desirable. On one hand, officers may simply choose not to inform a suspect of the grounds for arrest, thus avoiding the limitation that it would impose on the facts and circumstances supporting probable cause. On the other hand, officers will err on the side of charging every offense they believe might arise from the facts and circumstances. *United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) (limiting probable cause inquiry to articulated offense "would do no more than create an incentive" to routinely charge every offense). This stacking of charges has adverse consequences for the defendant. *See* Pet'r Br. at 24 n.5.

doctrine simply does not work and, as in *Royer* and *Garner*, the measure of probable cause is the totality of facts and circumstances known to the officer at the time of arrest, the objective reasonableness test. Even if the premise of the "closely related offense doctrine" is sound, and petitioners submit that it is not, it makes no sense to allow later extrapolated justification for arrest simply because no offense was articulated at arrest. But that is the result of the doctrine.

3. The "Closely Related Offense Doctrine" Is Contrary To The Decisions Of This Court

As posited by Alford and NACDL, the objective reasonableness of an intrusion on individual security is judged based on the officer's subjective decisions about whether an individual has committed an offense, except when they demonstrate pretext for an otherwise valid arrest. This is far different from the test formulated by the Court and is contrary to its jurisprudence.

Under the decisions of this Court, the objective reasonableness test broadly excludes the subjective beliefs of law enforcement officers in evaluating probable cause. For example, in *Sibron v. New York*, 392 U.S. 40, 63-65 (1968), the Court determined that, based on the facts and circumstances leading to Sibron's arrest, the arresting officer lacked probable cause for arrest and, thus, lacked authority to search Sibron incident to arrest. The Court did not end its inquiry at that point, however, as Alford's theory and the "closely related offense doctrine" would dictate. Instead, the Court examined whether "[the

patrolman's] seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous". *Id.* at 63. Although the Court ultimately rejected this alternative basis for justifying the search, the Court plainly did not confine its inquiry to the facts and circumstances establishing an articulated offense, or in NACDL's words, the "true grounds" for the intrusion. *United States v. Robinson*, 414 U.S. 218, 227 (1973), also demonstrates that in determining the permissibility of an intrusion under the Fourth Amendment, a reviewing court is not limited to looking at the facts and circumstances the officer used to justify the intrusion. Robinson was arrested for driving while his operator's permit was revoked. The arresting officer searched Robinson incident to arrest and discovered heroin. Robinson challenged his conviction for possession of heroin, arguing that the facts and circumstances giving rise to his arrest justified only a frisk for weapons. The Court declined to accept Robinson's proposed "novel and far-reaching limitation". *Robinson*, 414 U.S. at 229. Looking more broadly, the Court held that other considerations justified the search. *Id.*

Further, none of the decisions of this Court relied on by NACDL support the notion that the officer's subjective articulation of an offense at arrest, or the "true grounds" for arrest, limit the examination of probable cause. For example, NACDL's snippet from *Stacey v. Emery*, 97 U.S. 642, 645 (1878), "that the party is guilty *of the offense with which he is charged*" (emphasis added by NACDL), says nothing for this case, as the scope of

the probable cause inquiry was not there in question. NACDL Br. at 7. NACDL also relies on statements from *Terry* requiring justification of "the particular intrusion" as though "the particular intrusion" refers to the articulated offense or the officer's subjective reason for the action taken. NACDL Br. at 7-8. It does not. In context, the reference is to the justification required for the particular *type* of intrusion—justification that varies based on whether the intrusion is a stop, a frisk, an arrest, or a search. Indeed, *Terry* reiterates that the "central inquiry under the Fourth Amendment [is] the reasonableness in all of the circumstances of the . . . governmental invasion of a citizen's personal security". *Terry*, 392 U.S. at 19. Nor when considered in context, does NACDL's quote from *United States v. Brignoni-Ponce*, 422 U.S. 873, 886, n.11 (1975) (NACDL Br. at 9), support the notion that the articulated offense or "true grounds" for the arrest limits the scope of relevant facts and circumstances that may be considered in examining probable cause. In *Brignoni-Ponce*, the Court rejected the government's effort to import a new justification for an otherwise unlawful stop "at this stage of the case" on the basis that it had neither been raised in the trial court nor in the court of appeals. *Id.*

Alford additionally quotes from *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968), to argue that facts relating to an offense that is not articulated at arrest are unavailable to demonstrate probable cause. Resp't Br. at 12-13. But the quote is a dissent from an order dismissing the writ of certiorari as improvidently granted. Concurring in

the dismissal, Justices Fortas and Marshall explain that the writ was dismissed precisely because the record was inadequate for the Court to consider whether probable cause existed based on an uncharged offense. *Wainwright*, 392 U.S. at 598-99.

NACDL also asserts that "fundamental Fourth Amendment principles prohibit[] police officers from intruding on . . . personal liberty unless the . . . officer has [a] basis for believing that the private citizen has committed a particular offense". NACDL Br. at 2. As discussed above, at pages 9-10, neither *Terry* nor *Stacey*, the cases cited by NACDL to support this "fundamental" proposition, actually do so. Alford himself asserts the same principle, citing an explicit requirement in the 1776 Virginia Declaration of Rights—a requirement that is not contained in the Fourth Amendment and that speaks only to warrant requirements in any event. Resp't Br. at 16.

The Court's jurisprudence, on the other hand, strongly indicates that probable cause to arrest does not rise and fall with the existence of a specific offense. *See, e.g., Michigan v. DePhillippo*, 443 U.S. 31 (1979) (probable cause to arrest not vitiated where ordinance establishing offense subsequently was held unconstitutional); *Hill v. California*, 401 U.S. 797 (1971) (probable cause to arrest still existed where the wrong person was reasonably arrested). This view also comports with the more general recognition that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment" (*id.* at 804) and is a function of "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

technicians, act". *Id.* at 404-05 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

4. The "Closely Related Offense Doctrine" Is Inconsistent With The Public Policy Values Of The Fourth Amendment

The reasonableness requirement of the Fourth Amendment is a question of the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers". *Brignoni-Ponce*, 422 U.S. at 878. Limiting the facts and circumstances known to the officer at the time of arrest to closely related offenses does not serve this balance. The physical intrusion on individual security occasioned by arrest is precisely the same whether or not the arresting officer ties the arrest to a specific offense. And whether an offense is articulated at arrest, the individual arrested is entitled to a prompt post-arrest judicial determination of probable cause, a determination certain to illuminate the offenses that may be charged. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). On the other hand, the public interest in detaining an individual who is reasonably believed to have engaged in conduct providing basis for arrest is substantial, regardless of the specific offense articulated by the arresting officer.[5]

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[5] Alford's argument tacitly seems to suggest that where probable cause for arrest exists only for an offense unrelated to the one articulated by the officer, no arrest would be made. Such a suggestion is groundless as a general matter and certainly is groundless in this case. Petitioners initially stopped Alford based on concerns that he was impersonating an officer, an unarticulated offense supported by probable cause. JA at 97, 101.

Alford argues broadly that the "closely related offense doctrine" serves the values of the Fourth Amendment by limiting ex post facto justifications for arrest. Resp't Br. at 5-14, 19-22. But under the doctrine, an arrest—supported by an ex post facto justification—is permissible, if the offense is closely related. Alford does not explain why an ex post facto justification is permissible when the offense is closely related but impermissible when it is not.[6] More puzzling, the rule treats justification that actually motivated the police to act as an ex post facto justification. This case is a perfect example. Impersonating an officer is not closely related to violation of the Privacy Act. Yet there can be no question that probable cause to arrest Alford for impersonating an officer was not an ex post facto justification. Trooper Haner stopped Alford in the first place because he suspected Alford was impersonating a police officer. Pet'r Br. at 3-4. Trooper Haner had no knowledge that Alford had a tape recorder or that Alford would record his conversation with petitioners.[7]

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[6] Indeed, *Kies v. City of Aurora*, 156 F. Supp. 2d 970 (N.D. Ill. 2001), which Alford criticizes as an example of the "perils of the 'anything goes' approach", actually involved the application of the closely related offense doctrine. Resp't Br. at 20. *Kies*, 156 F. Supp. 2d at 984 ("An arrest without probable cause does not violate the arrestee's rights so long as probable cause existed on a closely-related charge.").

[7] Alford also argues that the "closely related offense doctrine" is necessary to prevent racial profiling. Resp't Br. at 21-22. But this Court has held that it is the Equal Protection

Alford and NACDL also question whether the "closely related offense doctrine" substantially diminishes prosecutorial charging discretion. Resp't Br. at 13; NACDL Br. at 20. However, they ignore the fact that the application of the doctrine removes from the prosecutor's consideration other crimes established as the result of the arrest, including criminal activity uncovered by search incident to arrest. *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963).[8]

At bottom, Alford fails to demonstrate any basis in the Fourth Amendment or sound social policy for the substantial limitation that the "closely related offense doctrine" imposes on probable cause.

Clause, not the Fourth Amendment, that protects citizens from intentionally discriminatory application of the laws. *Whren*, 517 U.S. at 813 ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[8] Alford's argument that the common law right to resist arrest justifies that the "closely related offense doctrine" is misguided. Resp't Br. at 25. First, it assumes the very question presented, proceeding from the premise that an arrest justified by probable cause nonetheless is an unlawful arrest if probable cause does not exist for the offense articulated at arrest. Further, as Alford recognizes, the common law right to resist arrest has been substantially limited. Indeed, even if the arrest in this case had been invalid, Alford had no right to resist. *Washington v. Valentine*, 935 P.2d 1294, 1304 (Wash. 1997) (arrestee has no right to use force against arresting officers where unlawful arrest threatens only loss of freedom).

B. Petitioners Are Entitled To Qualified Immunity Because The "Closely Related Offense Doctrine" Was Not Clearly Established Law[9]

1. Whether The "Closely Related Offense Doctrine" Was Clearly Established Is Properly Before The Court

NACDL contends that whether the "closely related offense doctrine" was clearly established law is not presented, because it was not raised below. NACDL is wrong. Jury Instruction 12 (Pet. at 63a) allowed the jury to find that probable cause existed, "if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit *a crime*". (Emphasis added.) The instruction did not limit the jury to finding probable cause based only on crimes related to the Privacy Act. Alford did not object to this instruction, and Deputy Prosecutor Lindquist testified that probable cause existed for the offenses of obstructing and impersonating an officer. JA at 179-80. In effect then, the "closely related offense doctrine" was "dead letter" in the district court. The trial proceeded and the verdict was rendered based on the objective reasonableness test for probable cause.

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[9] If the Court concurs with petitioners that the Fourth Amendment is not violated simply because an officer articulates a crime for which probable cause is lacking when probable cause exists for any other crime, then it need not reach the question of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Alford did not assign error on appeal to Jury Instruction 12 and did not argue the "closely related offense doctrine" at all in his briefing before the Ninth Circuit. Whether the "closely related offense doctrine" applied was raised *sua sponte* by the Ninth Circuit panel shortly before oral argument, when the Court directed "counsel should be prepared to discuss the effect, if any, on this appeal of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994)". Pet. at 24a.

In advancing the objective reasonableness test in connection with their claim for qualified immunity, petitioners included in their Brief Of Appellees case law contrary to the "closely related offense doctrine", specifically *United States v. Saunders*, 476 F.2d 5 (5th Cir. 1973), and *Washington v. Huff*, 826 P.2d 698, 701 (Wash. Ct. App.), *review denied*, 119 Wash. 2d 1007 (Wash. 1992) (under the federal constitution "an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists"). Based on the "closely related offense doctrine", the Ninth Circuit rejected petitioners' qualified immunity claim and reversed the jury's verdict in favor of petitioners. Pet. at 12a-13a.[10] In doing so, the Ninth Circuit acknowledged that *Saunders* was contrary to the "closely related offense doctrine" but dismissed it as being the law of another Circuit and "not the test

[10] The Ninth Circuit's reversal ignored the fact that, based on objective evidence, the jury implicitly found probable cause to arrest Mr. Alford. *See* Jury Instruction 12, Pet. at 63a.

applied in the Ninth Circuit". The court below did not even acknowledge that under *Huff*, the "closely related offense doctrine" is contrary to the law in Washington that an arrest is valid so long as probable cause exists for any offense. *Huff*, 862 P.2d at 702.

Thus, the first occasion for petitioners to present written argument demonstrating that the "closely related offense doctrine" neither was the law nor clearly established law was in their Petition For Rehearing And Rehearing En Banc. Petitioners took immediate advantage of this opportunity, arguing they were entitled to qualified immunity under *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 734 (9th Cir. 2003) ("Probable cause need only exist as to any offense that could be charged under the circumstances."), and that their entitlement also was supported by case law in Washington and other circuits. Pet. Reh'g En Banc at 1, 7-8. The Ninth Circuit denied the Petition For Rehearing And Rehearing En Banc, and petitioners asserted in this Court that the Ninth Circuit erred in applying the doctrine. The record establishes that the inapplicability of the "closely related offense doctrine" was part and parcel of petitioners' argument in the district court and, thus, was raised below.

Even if petitioners had not argued below that the "closely related offense doctrine", was inapplicable, it is still properly before this Court. The Ninth Circuit decided the issue. According to the Ninth Circuit: "[P]robable cause to arrest Alford

for other unrelated offenses, if present, does not render his arrest lawful or objectively reasonable for the purpose of allowing the officers to invoke the shield of qualified immunity." Pet. at 13a n.13. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. . . . It suffices for our purposes that the court below passed on the issue presented.").

2. Alford Has Confused The Fourth Amendment's Objective Reasonableness Test For Determining Probable Cause With The Reasonable Officer Test Under Qualified Immunity Analysis

Alford improperly mixes the issue of whether the "closely related offense doctrine" is constitutionally required by the Fourth Amendment with the question of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted by the petitioners. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). *See* Resp't Br. at 1-2, 7-8. The constitutional question of whether probable cause is confined to facts and circumstances closely related to the offense cited by an officer at arrest is separate and distinct from the qualified immunity analysis of whether the rule was clearly established. At the time of Alford's arrest, case law in Washington and several circuits followed the objective reasonableness test of the Fourth

Amendment and held that an arrest was valid as long as probable cause existed for any crime.[11]

Given the divergence of authority, state and federal, on whether a court is constitutionally required to ignore the existence of probable cause for an offense unrelated to the offense cited at arrest, petitioners are entitled to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (when the state of the law is undeveloped and judges disagree on a constitutional question, law enforcement officers cannot be "expected to predict the future course of constitutional law").

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[11] *See Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (if probable cause exists, verbal announcement of the wrong offense does not vitiate an arrest); *United States v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002) (an arrest is valid, even if probable cause does not support arrest for the offense charged by the arresting officer if it exists for another offense); *Washington v. Huff*, 826 P.2d 698 (Wash. Ct. App.), *review denied*, 833 P.2d 387 (Wash. 1992); *People v. Rodriguez*, 53 Cal. App. 4th 1250, 1262, 62 Cal. Rptr. 2d 345 (1997); *Alaska v. Kendall*, 794 P.2d 114, 117 (Alaska 1990); *Golden v. Virginia*, 519 S.E.2d 378 (Va. Ct. App. 1999); *Florida v. Cote*, 547 So. 2d 993 (Fla. Dist. Ct. App. 1989); *People v. Kincy*, 435 N.E.2d 831 (Ill. App. Ct. 1982); *Tennessee v. Duer*, 616 S.W.2d 614 (Tenn. Crim. App. 1981). New Hampshire, Rhode Island, and Delaware statutes provide that an arrest will be upheld even if the officer charged the wrong offense. N.H. Rev. Stat. § 594:13; R.I. Gen. Laws 12-7-5; Del. Code. Ann. tit. 11, § 1905. The Uniform Arrest Act contains an analogous provision, section 7. *See* Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 346 (1942).

C. Conclusion

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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GERALD DEVENPECK, ET AL., PETITIONERS

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JEROME ANTHONY ALFORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether an arrest is valid under the Fourth Amendment when the grounds given by the arresting officers are later determined to be unfounded, but the facts known to the officers objectively establish probable cause for a different offense, where the second offense is not "closely related" to the stated grounds for the arrest.

2. Whether officers are entitled to qualified immunity for such an arrest when, at the time of the arrest, courts were in conflict over whether, and under what circumstances, a "closely related offense" rule governed the validity of arrests.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and the interpretation of the Fourth Amendment right against unreasonable seizures. The United States has a substantial interest in the development of both Fourth Amendment law and principles of qualified immunity. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). And, principles of Fourth Amendment law apply to the United States because of its role in the investigation and prosecution of federal crimes.

STATEMENT

1. On the night of November 22, 1997, Washington State Patrol officer Joi Haner noticed a disabled vehicle on the shoulder of a "dark and deserted" stretch of highway in Kitsap County, Washington. Pet. App. 6a. As he passed the disabled car, Haner saw another car pull in behind it, which he later learned was driven by respondent Jerome Alford. Haner stopped to assist the motorists. As Haner stepped from his vehicle, respondent hurriedly returned to his car. *Id.* at 30a; J.A. 95. Respondent told Haner that the people in the stopped car had a flat tire and needed a flashlight. Respondent then drove off. Pet. App. 6a; J.A. 95.

The occupants of the disabled car told Haner that they thought respondent was a police officer, in part because his car had "wig-wag" headlights, which alternately flash on and off and are commonly used on police vehicles. Washington law prohibits persons other than police officers from operating vehicles equipped with flashing headlights. Pet. App. 30a; Wash. Rev. Code Ann. § 46.37.280(3) (West 2001). The motorists also said that respondent had left his flashlight behind, which Haner thought reflected suspicious haste to leave the scene. Pet. App. 6a; J.A. 96-97. Because Haner was concerned that respondent was pretending to be a police officer to prey on motorists, Haner called his supervisor, petitioner Sergeant Gerald Devenpeck, to alert him and request assistance. J.A. 98-101.

Haner drove off in pursuit of respondent. Once Haner had pulled respondent over, Haner noticed that his license plate was nearly unreadable beneath a darkly tinted cover. Through the car window, Haner observed that respondent had a police-band radio broadcasting police communications, a portable police scanner, and handcuffs. Pet. App. 7a, 30a; J.A. 102-106. Respondent initially told Haner that "he worked for the State Patrol, and then he changed it to [the]

Texas [Highway Patrol], and [then to] the [Puget Sound Naval] [S]hipyard police." J.A. 106. Respondent said that his flashing headlights were part of an alarm system that had just been installed, but he claimed to be unable to activate them at Haner's request. J.A. 107. Haner noticed that in his effort to activate the flashing headlights, respondent had pressed several buttons on his keychain and dashboard, but not a button on the steering column that Haner suspected controlled the lights. J.A. 108.

Devenpeck then arrived and discussed with Haner what had happened. J.A. 110-111. Respondent told Devenpeck that he had previously been cited by the Kitsap County Sheriff for having flashing headlights but that he believed they "were legal because * * * the Kitsap County Sheriff had apologized to him and sent him a letter and * * * the ACLU said he could use them as long as he wasn't impersonating [a police officer]." J.A. 134. Because Devenpeck was suspicious of respondent's claim that the flashing lights were simply a feature of his alarm, he asked respondent to show him the section of the alarm user's manual that would describe "what would happen when you activated the alarm." J.A. 138. Devenpeck then noticed an operating tape recorder concealed beneath a coat on respondent's passenger seat and concluded that respondent had been recording the conversation with the officers. Pet. App. 7a. Devenpeck told respondent that he was under arrest for recording the conversation with the officers without their consent. *Ibid.*; J.A. 145. At the scene, Devenpeck reviewed a copy of the Washington Privacy Act, Wash. Rev. Code Ann. § 9.73.030(1)(b) (West 2003),[1] which provides that, "it shall be unlawful for any individual * * * [to] record any * * * [p]rivate conversation * * * without first obtaining the

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[1] Relevant provisions of the Washington Code are reproduced at Pet. App. 66a-69a.

consent of all the persons engaged in the conversation." See Pet. App. 14a & n.4. Devenpeck's review confirmed his belief that the Act prohibited respondent's actions. *Id.* at 16a; J.A. 142, 144, 152.

Respondent said that, because he had had a similar problem recording a conversation with other police officers, he carried in his glove compartment a copy of a Washington Court of Appeals decision holding that the Privacy Act did not apply to the tape-recording of police officers performing official duties, an apparent reference to *State* v. *Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992). Pet. App. 7a. While conducting an inventory of respondent's car in preparation to impound it, Devenpeck did not find a copy of the *Flora* decision in the glove compartment or elsewhere in the car. J.A. 151. Devenpeck also pressed the button Haner had noticed and activated the flashing headlights. Pet. App. 32a.

While Haner was taking respondent to jail, Devenpeck called Deputy Prosecuting Attorney Mark Lindquist, reported what had happened, and read to him the relevant provision of the Privacy Act. Pet. App. 8a, 18a; J.A. 178. Lindquist told Devenpeck that there was "clearly probable cause" (J.A. 179) to arrest respondent for obstructing an officer (because of respondent's evasiveness in responding to questions and requests), see Wash. Rev. Code Ann. § 9A.76.020 (West 2000 & Supp. 2004), for impersonating an officer (based on the flashing headlights, obscured license plate, handcuffs, and police radio equipment in the car), see *id.* § 9A.60.040, and for violating the Privacy Act. J.A. 177, 180. At booking, respondent also was cited for operating a vehicle equipped with flashing headlights. J.A. 10, 24. See generally Wash. Rev. Code Ann. § 46.37.280(3) (West 2001).

A state court later dismissed both the Privacy Act charge (based on *Flora*, *supra*) and the flashing-headlights charge. J.A. 10, 29.

2. Respondent filed suit in federal district court against the Washington State Patrol, Haner and Devenpeck, and others. See Pet. App. 33a. As relevant here, respondent alleged that Haner and Devenpeck had arrested him without probable cause in violation of his rights under the Fourth and Fourteenth Amendments. See 42 U.S.C. 1983. The defendants moved for summary judgment. The district court dismissed claims against the State Patrol and the other individual defendants, but denied Haner and Devenpeck's motion to dismiss on qualified immunity grounds. Pet. App. 34a-40a. The court concluded that it was clearly established in 1997 that the Privacy Act did "not prohibit taping of the police officers in a situation such as the present one." *Id.* at 39a (citing *Flora*, *supra*). Because the court determined that there was "an issue of fact on whether the officers reasonably believed their conduct was lawful," it denied petitioners summary judgment on the qualified immunity issue. *Id.* at 40a.

At trial, the district court instructed the jury that, at the time of the incident, it was clearly established that the state Privacy Act did not prohibit "tape-record[ing] a police officer in the performance of an official function on a public thoroughfare." J.A. 190, 202 (citing *Flora*, *supra*). The court instructed the jury to consider whether petitioners had probable cause to believe that respondent had committed an offense or reasonably believed that the arrest was lawful. J.A. 188-189. The jury returned a verdict in favor of petitioners, J.A. 207, and the district court denied respondent's motion for a new trial. Pet. App. 25a.

3. A divided panel of the court of appeals reversed. Pet. App. 5a-17a. The court held that "under clearly established [state] law, the conduct for which [respondent] was arrested was not a violation of the Privacy Act," *id.* at 10a, and the court rejected petitioners' argument that the arrest nevertheless was valid under the Fourth Amendment because

there was probable cause to arrest respondent for other offenses. *Ibid.* The court stated that, under Ninth Circuit law, an arrest on a charge not supported by probable cause is still valid if there is "[p]robable cause * * * for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Ibid.* (quoting *Gasho* v. *United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995)). Applying that test, the court held that even if there were probable cause to believe that respondent had impersonated or obstructed a police officer, that "does not cure the lack of probable cause" because those offenses "are not closely related to the crime for which [petitioners] arrested [respondent], nor was the conduct required for impersonation and obstruction similar to the conduct for which [respondent] was arrested: tape recording a traffic stop." *Id.* at 11a.

The court also rejected petitioners' claim that they were entitled to qualified immunity because "a reasonable officer would have believed [respondent] was violating the state privacy law." Pet. App. 11a. The court concluded that, because the Privacy Act prohibited only the recording of a "private conversation," and because *Flora* established that "a traffic stop was not a private encounter," *id.* at 14a, "no reasonable officer could think that [respondent] had recorded a private conversation in violation of the Washington Privacy Act." *Id.* at 15a. The court also rejected the argument that petitioners were immune because they reasonably believed that there was probable cause that respondent had committed other offenses, saying that to accept that argument "would eviscerate * * * the 'closely related offense' doctrine." *Id.* at 13a n.2.

Judge Gould dissented. Pet. App. 17a-22a. He wrote that "[t]he officers * * * provided an example of how a responsible and fair-minded officer should proceed deliberately when

unfamiliar with the law a person is or may be violating." *Id.* at 18a. Judge Gould noted that the "broad literal text of the privacy statute," *id.* at 20a, supported the arrest, because "one might say that two officers talking to a suspect alone in an automobile at roadside on a secluded highway, with no one else present, were engaged in a 'private conversation'" protected by the statute. *Id.* at 19a. He believed that a jury could reasonably find that "the officers who read the literal language of the statute, who were unaware of [the] intermediate appellate court precedent, and who received supportive advice from the * * * prosecuting attorney, had a reasonable belief that [respondent']s conduct violated the Privacy Act." *Ibid.*

SUMMARY OF ARGUMENT

Respondent's arrest did not violate his Fourth Amendment rights, much less any clearly established right. An officer may arrest a suspect without a warrant if "the events leading up to the arrest, * * * viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland* v. *Pringle*, 124 S. Ct. 795, 800 (2003) (internal quotation marks omitted). Because that inquiry turns on an objective assessment of the facts rather than the arresting officers' subjective understanding, an arrest is constitutionally valid if the officers have probable cause to arrest the defendant for any offense, even if it is unrelated to the charge initially articulated by the arresting officer.

The court of appeals held that if a police officer arrests a suspect on a charge that is later determined to be unfounded, the arrest is constitutionally invalid unless the officers have probable cause to believe the defendant committed another offense that is "closely related" to the articulated basis for the arrest. That so-called "closely related offense" doctrine is designed to deter bad-faith arrests, knowingly made without probable cause, by preventing police from justifying

them with post-hoc rationalizations. But such a rule is fundamentally inconsistent with the basic principle that officers' subjective intentions play no role in probable cause analysis. *Whren* v. *United States*, 517 U.S. 806 (1996). It is also inconsistent with the principle that an officer's subjective legal evaluation of a situation is irrelevant to the existence of probable cause. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality opinion); *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968). And it would cause the scope of Fourth Amendment protections to vary depending on the arresting officer's evaluation of circumstances.

The "closely related offense" doctrine also is unworkable because it fails to provide clear guidance to police. It raises difficult questions about the manner in which offenses must be related and how closely related they must be before an arrest will be upheld, making the test difficult to administer and apply predictably. It harms the interests of arrestees, by giving police an incentive to charge every applicable offense to ensure that probable cause exists for at least one of them, or simply to refrain from specifying the basis for the arrest. The "closely related offense" doctrine imposes substantial social costs by requiring the suppression of evidence resulting from arrests for which there was probable cause, but does not yield significant benefits because police already have incentives not to make arrests they believe or know to be invalid in the hope that a basis later will be found to support them. The doctrine is poorly tailored to serve its stated purpose, because it does not deter sham arrests for which the officer does not state the basis for arrest, while at the same time invalidating arrests, such as respondent's, which are made in good faith based upon probable cause.

Even if the Fourth Amendment incorporated a "closely related offense" principle, petitioners would be entitled to qualified immunity on the facts of this case. The evidence at trial, taken in the light most favorable to petitioners, amply

supported a determination that the officers reasonably believed respondent had violated state law by impersonating a police officer and obstructing police, and that those offenses justified arrest. Morever, at the time of arrest, the Ninth Circuit had not clearly established the contours of the "closely related" offense doctrine in a way that made clear that this arrest was unlawful. In particular, the Ninth Circuit had not had occasion to consider whether an arrest for behavior occurring during a police investigation was "closely related" to the underlying conduct that precipitated the investigation, an issue that had divided the courts of appeals. Moreover, although the Ninth Circuit had adopted the "closely related offense" doctrine, other courts, including the Washington Supreme Court, had held that an arrest is valid so long as there is probable cause to believe the suspect had committed *any* offense. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

ARGUMENT

RESPONDENT'S ARREST DID NOT VIOLATE THE FOURTH AMENDMENT, LET ALONE CLEARLY ESTABLISHED LAW

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The court first must decide whether the facts state a violation of a constitutional right. In this case, respondent's arrest complied with the Fourth Amendment, and the Court need not reach the second question. But in the event the Court finds the conduct violated the Constitution, it must then decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situa-

tion he confronted." *Saucier*, 533 U.S. at 202. Respondent's effort to obtain money damages fails in this latter respect as well.

I. AN ARREST ON A CHARGE THAT IS LATER FOUND TO BE INVALID IS STILL LAWFUL IF THE POLICE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR A DIFFERENT OFFENSE, EVEN IF THAT OFFENSE IS NOT CLOSELY RELATED TO THE OFFENSE THAT WAS THE ARTICULATED BASIS FOR THE ARREST

The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. See *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). A law enforcement officer may, consistent with the Fourth Amendment, arrest a suspect without a warrant if the officer has probable cause to believe the suspect has committed an offense. *United States* v. *Watson*, 423 U.S. 411, 418 (1976). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland* v. *Pringle*, 124 S. Ct. 795, 800 (2003) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). Because the inquiry turns on an objective assessment of the facts rather than the arresting officers' subjective understanding, an arrest is constitutionally valid if the officers in fact have probable cause to arrest the suspect for an offense, even if the arresting officer cites an unrelated offense as the reason for the arrest. *Lee* v. *Ferraro*, 284 F.3d 1188, 1195-1196 (11th Cir. 2002); *United States* v. *Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002); *Barna* v. *City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994). Contrary to the holding of the court of appeals, there is no Fourth Amendment requirement that the offense for which probable cause exists must

be "closely related" to the ground that the officer invokes in making the arrest.

A. The "Closely Related Offense" Doctrine Conflicts With Basic Fourth Amendment Principles

This Court has repeatedly held that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's subjective state of mind at the time the actions were taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)). "With the limited exception of some special needs and administrative search cases, see *Indianapolis* v. *Edmond*, 531 U.S. 32, 45 (2000), 'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *United States* v. *Knights*, 534 U.S. 112, 122 (2001) (quoting *Whren* v. *United States*, 517 U.S. 806, 813 (1996)). That principle is responsive to Fourth Amendment values, because the legality of a search or seizure ultimately turns on whether the facts known to officers justify a particular intrusion on privacy interests, *i.e.*, "the issue is * * * the objective effect of [the officer's] actions." *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000).

Consistent with that principle, the Court has held in a variety of contexts that officers' motivation, intent, and legal evaluation of circumstances are irrelevant to the inquiry. Those include the scope of a defendant's consent to a search, *Florida* v. *Jimeno*, 500 U.S. 248, 250-252 (1991); the scope of the "plain view" doctrine, *Horton* v. *California*, 496 U.S. 128, 138 (1990); the amount of force that may reasonably be used in making an arrest, *Graham* v. *Connor*, 490 U.S. 386, 397-399 (1989); the scope of a search incident to arrest, *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); the existence of

a Fourth Amendment "seizure," *Macon*, 472 U.S. at 470-471; the reasonableness of efforts to minimize the interception of conversations not covered by a wiretap order, *Scott*, 436 U.S. at 137-138; the reasonableness of an officer's decision to board a vessel for document inspection, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); the duration of a traffic stop, *Ohio* v. *Robinette*, 519 U.S. 33, 38-39 (1996); and, significantly here, the basis for a probable-cause traffic stop, *Whren*, 517 U.S. at 813. Accord *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968) (in analyzing the reasonableness of a search or seizure, "it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure * * * 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"). The Fourth Amendment's focus on objective circumstances promotes important interests in "evenhanded law enforcement," *Horton*, 496 U.S. at 138, by ensuring that its protections do not "vary from place to place and from time to time." *Whren*, 517 U.S. at 815. The "closely related offense" doctrine departs from that bedrock Fourth Amendment rule by seeking to combat perceived bad-faith conduct even if it was objectively justified and by ascribing significance to officers' understanding of the law.

1. The courts that have adopted the "closely related offense" doctrine have stated that it is designed to prevent officers from "justify[ing] what from the outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid." *Vance* v. *Nunnery*, 137 F.3d 270, 275 (5th Cir. 1998); accord *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999); *Richardson* v. *Bonds*, 860 F.2d 1427, 1431 (7th Cir. 1988). But that rationale is fundamentally inconsistent with the basic principle that "[s]ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. In *Whren*, this Court held that

police officers' subjective motivation for stopping a car was irrelevant so long as the traffic stop was supported by probable cause to believe the driver had violated the traffic laws. The Court unanimously rejected the view that "an ulterior motive might serve to strip the agents of their legal justification" if probable cause supported their actions. *Id.* at 812. The Court observed that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Ibid.* (quoting *Scott*, 436 U.S. at 138). Accord *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (extending *Whren*'s holding to custodial arrests). By the same principle, it is irrelevant whether an arresting officer subjectively intended to conduct a fraudulent or sham arrest. Because the legality of an arrest turns on whether "the objective effect of [the officer's] actions" was justified by the facts known to the officers, *Bond*, 529 U.S. at 338 n.2, the officer's subjective intent or bad faith is irrelevant.

The "closely related offense" doctrine does not escape its focus on subjective motivation because its application depends in part on an "objective" fact—the arresting officer's statement of the charge supporting the arrest. In *Whren*, the defendants similarly argued that the validity of a traffic stop should depend on the ostensibly "objective" inquiry into whether "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the [traffic] stop for the reasons given." 517 U.S. at 814. The Court rejected that proposal, in part because "although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations" because "it is designed to combat nothing other than the perceived 'danger' of the pretextual stop." *Ibid.* The same logic applies here as well. The

"closely related offense" doctrine is, like the standard offered by the defendants in *Whren*, an "attempt to root out [a] subjective vice[] through objective means." *Ibid.* The officers' stated basis for the arrest is relevant only because it provides a point of comparison for offenses later identified to justify the arrest, and the comparison is thought relevant only because the lack of a close relationship between the offenses gives rise to a presumption that the arrest was a sham, undertaken with knowledge that probable cause was lacking. Such indirect means of ferreting out a presumed nefarious subjective intent is contrary to the governing principle that objective facts, not the officer's state of mind, control the validity of the arrest. See *United States* v. *Reed*, 349 F.3d 457, 468 (7th Cir. 2003) (Easterbrook, J., dissenting) ("making [the validity of an arrest] turn on relations among offenses [is] hard to reconcile with the Supreme Court's objective approach").

2. The "closely related offense" doctrine is also impermissibly subjective because it holds that the validity of an arrest turns on the arresting officer's subjective *legal* evaluation of the crimes for which probable cause exists. In *Florida* v. *Royer*, 460 U.S. 491 (1983), the Court held that police officers at an airport had illegally detained a traveler, thus vitiating his purported consent to the search of his luggage. *Id.* at 507-508; *id.* at 509 (Brennan, J., concurring in the result). A plurality of the Court concluded that the officers' restrictions on the suspect's movement were tantamount to arrest, *id.* at 503, and rejected the State's argument that the arrest was supported by probable cause. *Id.* at 507-508. But the plurality took care to note that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search." *Id.* at 507. Thus, an

arrest objectively supported by probable cause may be lawful despite the arresting officer's belief that probable cause is lacking. Cf. *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968) (upholding search as incident to lawful arrest, even though it was initially justified as a stop-and-frisk).[2]

In keeping with *Royer*, the federal courts of appeals have consistently held that an arresting officer's subjective belief that he did not have probable cause for an arrest or search is irrelevant to probable cause analysis.[3] It would be anomalous if an arrest that in fact was supported by probable cause were valid although officers mistakenly believed they lacked probable cause, but the same arrest would be invalid if officers correctly believed they had probable cause but were mistaken about the grounds for it. There is no basis for concluding that "an erroneous legal characterization by a policeman somehow makes his conduct illegal even though but for that mistake the officer would likely have proceeded

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[2] A number of courts of appeals have reached similar results. See, *e.g.*, *United States* v. *Cervantes*, 19 F.3d 1151, 1153-1154 (7th Cir. 1994) (Posner, J.) (where police claimed search of car was incident to arrest of driver on weapons charge but probable cause for that charge was later found to be lacking, upholding the search because there was probable cause that the car contained drug proceeds); *United States* v. *Bowman*, 907 F.2d 63, 65 (8th Cir. 1990) ("The fact the agents thought they were making an investigatory stop did not foreclose the government from proving probable cause."); *United States* v. *Roy*, 869 F.2d 1427, 1432-1433 (11th Cir.) (holding that search performed as warrantless safety inspection was constitutionally valid because probable cause existed that evidence of crime would be found), cert. denied, 493 U.S. 818 (1989).

[3] See, *e.g.*, *United States* v. *$557,933.89 in U.S. Funds*, 287 F.3d 66, 85 (2d Cir. 2002) ("a search or seizure may be upheld if the facts known to the officer support the requisite level of suspicion even if the officer does not subjectively believe them so to do"); *United States* v. *Santana-Garcia*, 264 F.3d 1188, 1192 (10th Cir. 2001); *United States* v. *Anderson*, 923 F.2d 450, 457 (6th Cir. 1991), cert. denied, 499 U.S. 980 and 500 U.S. 936 (1991).

to the alternative correct legal characterization." 1 Wayne R. LaFave, *Search and Seizure* § 1.4(d), at 114 (3d ed. 1996).

B. The "Closely Related Offense" Doctrine Is Difficult To Administer And Yields Disparate Results

In "implementing [the Fourth Amendment's] command of reasonableness," this Court has emphasized the "essential interest" in adopting "readily administrable rules" that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment," and thus "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations." *Ibid.* The "closely related offense" doctrine fails this basic requirement. It is inherently difficult to administer, incapable of predictable application, and has produced widely varying results.

The "closely related offense" doctrine does not specify the manner in which offenses must be related: it is unclear whether the principal focus is the factual relatedness of the conduct supporting the offenses, the legal similarity of the statutory prohibitions defining the offenses, or both.[4] Nor

[4] Compare *Driebel* v. *City of Milwaukee*, 298 F.3d 622, 644 (7th Cir. 2002) (doctrine applies if "the charge can reasonably be based on the same set of facts that g[a]ve rise to the arrest" and alternative charge "would have recommended itself to a reasonable police officer acting in good faith at the time the arrest was made"); *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (the two crimes must "relate to the same conduct" and "share similar elements or be directed generally at prohibiting the same type of conduct"); *Avery* v. *King*, 110 F.3d 12, 14 (6th Cir. 1997) (test satisfied if the offenses are "in some fashion related"); *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (same), cert. denied, 406 U.S. 923 (1972).

does the test specify how "closely" related the offenses must be. Although most courts that have adopted the doctrine have said that offenses are "closely related" if they arise out of the "same conduct," *Gasho* v. *United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995), that test leaves questions of how expansively to define the relevant "conduct"—whether it includes only the specific conduct that was the immediate basis for arrest (here, respondent's recording of the conversation with the officers), or whether it includes the entire course of conduct culminating in arrest (here, respondent's suspicious conduct with the disabled motorist, his apparently feigned effort to activate the "wig wag" lights and evasive responses to inquiries, and his recording of the conversations). Tellingly, this Court has rejected both "closely related" offense and "same conduct" tests in the context of other constitutional rights on the grounds that they were unworkable. See *Texas* v. *Cobb*, 532 U.S. 162, 173-174 (2001) (rejecting as "difficult to administer" test that would prohibit officers from discussing with a suspect offenses "closely related to" offenses for which the right to counsel had attached); *United States* v. *Dixon*, 509 U.S. 688, 710 (1993) (overruling "same conduct" test for Double Jeopardy Clause, in part because it had been a "continuing source of confusion"); *id.* at 711 & n.16.

Some court of appeals decisions have required a near-identity between the elements of the crimes to establish relatedness, and demanded that the crime arise from the same discrete act of the defendant supporting the initial charge.[5] Other decisions have concluded that crimes are

[5] See, *e.g.*, *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (holding that "assault and battery" charge that officer was investigating at the time of defendant's allegedly disorderly conduct was not "related to" disorderly conduct; "the two crimes must share similar elements or be directed generally at prohibiting the same type of conduct" and "the crime with which the arrestee is charged and the crime offered to

related if they arise from the same general course of conduct.[6] Still other decisions define "relatedness" so broadly that the test is met so long as the later-offered charges are not so "extravagant or novel" that they transparently reflect a post-hoc scouring of the criminal code for an offense that fits the suspect's conduct.[7] Unsurprisingly, then, application of the "closely related offense" doctrine has led to disparate results.[8]

The complexity inherent in the rule undermines important interests in certainty and uniformity. The Fourth Amendment test that is applied in jurisdictions that have rejected

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the court as a justification for the arrest must relate to the same conduct").

[6] See, *e.g.*, *Biddle* v. *Martin*, 992 F.2d 673, 676-677 (7th Cir. 1993) (holding that the charge of "allowing another [person] to operate [the owner's] van in a manner contrary to law" was closely related to "obstructing a police officer" where the officer was investigating the traffic offense at the time of defendant's allegedly obstructive conduct); *Pfannstiel* v. *City of Marion*, 918 F.2d 1178, 1181, 1183 (5th Cir. 1990) (holding that "trespass" and "disorderly conduct" offenses were related where officer was investigating the trespass at the time of the defendant's disorderly conduct); *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (holding that the crime of obtaining property or services by false pretenses was related to the offense of operating an automobile with an improper tag, where the false license plate suggested defendant's fraudulent intent), cert. denied, 406 U.S. 923 (1972).

[7] *Richardson*, 860 F.2d at 1431 (finding offenses related "[s]ince a reasonable police officer would have known of both offenses at issue").

[8] Compare, *e.g.*, *Sheehy*, 191 F.3d at 20 (holding that assault charge that officer was investigating at the time of allegedly disorderly conduct was not "related to" disorderly conduct), with *Biddle*, 992 F.2d at 676-677 (holding that traffic offense was closely related to obstruction offense where the officer was investigating the traffic offense at the time of the allegedly obstructive conduct); *Pfannstiel*, 918 F.2d at 1181, 1183 (holding that "trespass" and "disorderly conduct" offenses were related where officer was investigating the trespass at the time of the defendant's disorderly conduct).

the "closely related offense" doctrine is quite straightforward: an arrest is valid so long as the facts known to the officer at the time of arrest are sufficient to support the finding of probable cause for *an* offense. By contrast, in jurisdictions that follow the "closely related offense" doctrine, courts must determine whether alternative offenses are "closely related" to the original charge under tests that defy easy analysis. That complexity serves no valid Fourth Amendment purpose.

C. The "Closely Related Offense" Doctrine Harms The Interests Of Arrestees

The "closely related offense" doctrine gives law-enforcement officers incentives to modify their behavior in ways that are harmful to potential arrestees in order to avoid the invalidation of arrests and to protect themselves from civil liability. First, it "create[s] an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive" and be supported by probable cause. *Bookhardt*, 277 F.3d at 566 (quoting *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971), cert. denied, 406 U.S. 923 (1972)). A practice of routine overcharging would be needlessly intimidating to arrestees and pointlessly lengthen their arrest records.

Second, the "closely related offense" doctrine gives officers an incentive to "simply remain silent as to the basis for the arrest," *Richardson*, 860 F.2d at 1430, and to wait until the defendant's initial appearance before a magistrate to notify the arrestee about the basis for the arrest. At that point, the officer typically would have the assistance of a prosecutor in drafting a charging document. The Fourth Amendment regulates seizures, not charging decisions. Thus, officers are under no constitutional obligation to inform those who have been arrested of the reason for their

arrest. See, *e.g.*, *Calusinski* v. *Kruger*, 24 F.3d 931, 936 n.6 (7th Cir. 1994) ("at the time of arrest an arrestee does not have a Fourth Amendment or Sixth Amendment right to be informed of the reason for the arrest"); *Williams* v. *Schario*, 93 F.3d 527, 529 (8th Cir. 1996) (per curiam) (same); see generally 3 Wayne R. LaFave, *Search and Seizure* § 5.1(e), at 15 n.197 (3d ed. Supp. 2004). Many jurisdictions (including both Washington and the federal government) do not require officers making warrantless arrests to inform arrestees of the basis for arrest. But see, *e.g.*, Tenn. Code Ann. § 40-7-106 (2003); S.D. Codified Laws § 23A- 3-4 (Michie 1998). A routine practice of officers remaining silent about the reason for an arrest would not benefit arrestees, because it is in their interest to be informed at the time of arrest about the charges against them both to decrease anxiety and to help them decide how to exercise their rights.[9]

D. The "Closely Related Offense" Doctrine Cannot Be Justified As A Deterrent To Sham Or Fraudulent Arrests

The "closely related offense" doctrine potentially imposes substantial social costs without offsetting benefits to the protection of constitutional rights. Under the doctrine, an arrest is unlawful if a police officer relies on a charge for which probable cause is later found to be lacking, even if the

[9] A suspect need not be informed about all possible subjects of questioning in order for the suspect to make a voluntary, knowing, and intelligent waiver of his Fifth Amendment privilege. *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987). But as a practical matter, some courts have said that "keeping a suspect informed of the * * * status of the charges * * * should be encouraged rather than discouraged." *United States* v. *Allen*, 247 F.3d 741, 765 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002), and cert. denied, 539 U.S. 916 (2003); accord *United States* v. *Crisco*, 725 F.2d 1228, 1232 (9th Cir.) (information about charges "contribute[s] to an intelligent exercise of [an arrestee's] judgment"), cert. denied, 466 U.S. 977 (1984).

facts known to the officer established probable cause to believe the person arrested had committed another offense. Although a finding that an arrest is unlawful does not in itself preclude prosecution of the arrestee, it would ordinarily deprive the government of the use at trial of all evidence found to be the fruit of that unlawful arrest, including the defendant's own statements and any physical evidence that resulted from the arrest. See, *e.g.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975). While in some instances the government might nevertheless be able to use the evidence if it could demonstrate that the effect of the illegal arrest was sufficiently attenuated, see *id.* at 603-604, or establish an exception to the exclusionary rule, see, *e.g.*, *Murray* v. *United States*, 487 U.S. 533, 537, 539 (1988); *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), in many instances, the evidence would be inadmissible. The exclusion of such evidence damages the truth-seeking function of trials and creates a serious risk of permitting guilty defendants to go free, undermining "society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532 U.S. at 172.

The need to deter sham or fraudulent arrests does not justify that substantial cost. To begin with, the conduct that the "closely related offense" doctrine is designed to protect against is unlikely to occur. As the author of a leading Fourth Amendment treatise explained:

> Suppression for police reliance on the wrong theory even when there exists an alternative valid theory would prevent unconstitutional [action] only if, absent such an extension of the exclusionary rule, it may be assumed police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of

which they are presently unaware. That assumption, in my judgment, is fanciful.

1 LaFave, *supra*, § 1.4(d), at 114. There is no basis to believe that police officers will proceed with an arrest although they know probable cause to be lacking based on the speculative possibility that a prosecutor later will be able to discern probable cause for an offense that eluded them. Cf. *Nix* v. *Williams*, 467 U.S. at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."). Thus, the prospect of the suppression of all evidence resulting from an arrest, as well as "the possibility of departmental discipline and civil liability," *id.* at 446, provide investigators strong incentives, even without the "closely related offense" doctrine, to refrain from arresting persons on grounds they know or suspect to be insufficient.

Even if the "closely related offense" doctrine could be justified as a measure to deter sham arrests, it is poorly tailored to accomplish that goal. To begin with, it provides no deterrence against sham arrests in which the officer does not articulate the reason for arrest. In such a case, there is no basis for saying that the charges ultimately filed against the defendant are insufficiently related to the initial charge.

The rule also sweeps far more broadly than is warranted by its deterrence rationale, invalidating not only arrests made in bad faith without probable cause, but also arrests made in good faith and amply supported by probable cause. It is incorrect to conclude that an officer who arrests a defendant for an offense that later is discovered to be invalid was acting in bad faith, whenever the alternative grounds that objectively support the arrest are not "closely related" to the offense originally charged. "A policeman on the scene cannot be expected to assay the evidence with the technical

precision of a prosecutor drawing an information." *Washington Mobilization Comm.* v. *Cullinane*, 566 F.2d 107, 123 (D.C. Cir. 1977). Thus, in determining what offense to charge, "it is inevitable that law enforcement officials will in some cases * * * mistakenly conclude that probable cause is present." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); cf. *Illinois* v. *Gates*, 462 U.S. 213, 234 (1983) (noting that "nonlawyers in the midst and haste of a criminal investigation" will make mistakes). In addition, because criminal conduct is often still under investigation at the time of arrest, it will often be difficult or impossible to know with precision what crime has been committed. See, *e.g.*, 3 LaFave, *supra*, § 5.2(c), at 75 (3d ed. 1996). Faced with a menu of conceivable offenses, well intentioned officers may in good faith select one for which probable cause is lacking. Because strong disincentives already exist for misbehavior, the "closely related offense" doctrine is likely to invalidate more good-faith arrests than sham or fraudulent ones.

This case illustrates the point. There is no suggestion that petitioners' arrest of respondent was a sham or fraud or that petitioners intentionally arrested someone they knew to be innocent of any offense. As Judge Gould observed, "[t]he officers did not arrest [respondent] on a rogue mission, nor motivated by malice, nor on a whim." Pet. App. 18a. Indeed, the majority acknowledged petitioners' "good faith." *Id.* at 13a. Nor is there any indication that the alternative bases offered reflect "*ex post facto* extrapolation" to justify the arrest. As respondent notes (Br. in Opp. 2), Haner followed and stopped respondent's car because he suspected respondent of unlawfully impersonating a police officer, and that was the initial focus of the officers' inquiries after the stop. Pet. App. 6a-7a, 30-31a. When the officers contacted the prosecutor shortly after arresting respondent, they discussed with the prosecutor the existence of probable cause not only for a Privacy Act violation but for police-imper-

sonation and obstruction offenses as well. J.A. 177, 180. Indeed, petitioners cited respondent for unlawfully operating a vehicle with flashing headlights. J.A. 10, 24.

II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY

Qualified immunity shields a police officer from suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Ibid.* Taken in the light most favorable to petitioners, the evidence presented at trial amply supports a determination that petitioners reasonably believed they had probable cause that respondent had committed an offense. In light of that evidence and the clear split of authority about the validity and contours of the "closely related offense" doctrine, respondent's arrest did not violate clearly established law.

To begin with, there was ample evidence that respondent had impersonated a police officer in violation of Wash. Rev. Code Ann. § 9A.60.040 (West 2000 & Supp. 2004). Respondent had pulled in behind a disabled vehicle on a dark and secluded stretch of highway, turned on his flashing headlights, left quickly when a state trooper arrived, falsely told Haner that he had worked in law enforcement (J.A. 106), tried to obscure his license plate, and had a police radio, police scanner, and handcuffs. Pet. App. 6a-7a; *id.* at 17a (Gould, J., dissenting) (respondent's conduct was "ominous to say the least"). There likewise was probable cause to believe respondent had obstructed a law enforcement officer in violation of Wash. Rev. Code Ann. § 9A.76.020 (West 2000 & Supp. 2004). Respondent falsely said that he had worked in

law enforcement, that he had been given permission to "use [flashing headlights] as long as he wasn't impersonating [an officer]," J.A. 134, and that the lights were part of his alarm system, and he pressed various buttons on his keychain and dashboard in a purported effort to activate the lights, while making an apparently conscious effort not to press a particular switch on the steering column that later was found to activate the flashing headlights. Respondent's evasive statements and conduct themselves indicate consciousness of guilt. *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975). The reasonableness of petitioners' conclusion is underscored by the fact that Devenpeck conferred with a prosecuting attorney while respondent was in transit to jail. Cf., *e.g.*, *Kijonka* v. *Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (Posner, J.) ("Consulting a prosecutor * * * goes far to establish qualified immunity.").[10]

The officers could reasonably have believed that the arrest of respondent was valid if they had probable cause to believe respondent had committed any offense and not simply the Privacy Act violation. The Ninth Circuit had not clearly established that the "closely related offense" doctrine would render this arrest unlawful. While the Ninth Circuit

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[10] In addition, there was ample evidence that the officers reasonably believed that respondent violated the state Privacy Act when he recorded his conversation with the officers. As Judge Gould noted in dissent, the "broad literal text of the privacy statute," Pet. App. 20a, which makes it unlawful for "any individual * * * to * * * record any * * * [p]rivate conversation * * * without first obtaining the consent of all the persons engaged in the conversation," Wash. Rev. Code Ann. § 9.73.030(1)(b) (West 2003), facially applied to the officers' conversation at the roadside with respondent. Petitioners acted with reasonable care by reading the relevant statute at the scene, and their ignorance of *Flora*—a decision of the intermediate court of appeals for another division of the state that was not binding on the court of appeals where the arrest occurred, see Pet. App. 20a n.3; see generally *Eriksen* v. *Mobay Corp.*, 41 P.3d 488, 495 (Wash. Ct. App. 2002)—did not render the arrest unreasonable.

previously had stated in a footnote that "[p]robable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested," *Gasho*, 39 F.3d at 1428 n.6, the court did so in the context of two nearly identical crimes (removal of property under the control of the Customs Service and removal of seized property), and so had no occasion to elaborate on the contours of the "closely related offense" doctrine. Thus, it was not clear at the time of the arrest whether the Ninth Circuit would take a narrow view of that doctrine instead of the more expansive interpretation embraced by other courts, which the additional offenses at issue in this case would satisfy. Compare, *e.g.*, *Biddie* v. *Martin*, 992 F.2d 673, 676-677 (7th Cir. 1993) (holding additional offenses proffered by officers to be within "closely related offense" doctrine because they were "neither 'novel' nor 'extravagant'"); *Pfannstiel* v. *City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990); *Atkinson*, 450 F.2d at 838.

In particular, the Ninth Circuit had not had occasion to consider whether an arrest for behavior occurring after a traffic stop was "closely related" to the conduct that precipitated the stop, even if the crimes have different elements. Courts of appeals have reached differing conclusions on the related question of whether disorderly conduct or obstruction charges arising from behavior occurring during police investigation of an offense is "closely related" to the underlying offense, see n.8, *supra*, indicating that the issue is a difficult one. Ninth Circuit law on that issue was not clearly established at the time of the arrest.

Even if the Ninth Circuit case law had been clear, it would not have made *the relevant law* sufficiently clear to deny qualified immunity because the Washington state courts take a different view. It has long been the rule in Washington state courts that an arrest is valid although the

charge stated by police is later determined to be unfounded if there was probable cause at the time of the arrest to believe the defendant had committed other offenses. *E.g.*, *State* v. *Vangen*, 433 P.2d 691, 694 (Wash. 1967); *State* v. *Huff*, 826 P.2d 698, 700 (Wash. Ct. App.) (collecting authorities), review denied, 833 P.2d 387 (Wash. 1992). See also 1 LaFave, *supra*, § 1.4(d), at 112 (noting broader conflict among courts of appeals, and stating that the position that police reliance on an incorrect theory affects the validity of the arrest "appears to be a minority view").

The conflict between Washington state courts and the federal appellate court with jurisdiction over Washington about the interpretation of the Fourth Amendment is the kind of circumstance that led this Court to grant certiorari in order to "clearly establish" what the law is. It is not the kind of circumstance that should lead to liability for an officer who wrongly predicts how the Court will resolve the conflict. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999); accord *Hanlon* v. *Berger*, 526 U.S. 808, 810 (1999) (per curiam) (concluding that officers were entitled to qualified immunity even though Ninth Circuit had anticipated the Court's holding that media ride-alongs violate the Fourth Amendment). There is no basis for "insisting 'that policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers.'" 1 LaFave, *supra*, § 1.4(d), at 114 (quoting *State* v. *Romeo*, 203 A.2d 23, 32 (N.J. 1964), cert. denied, 379 U.S. 970 (1965)).

* * * * *

The court of appeals lost sight of controlling principles of Fourth Amendment and qualified immunity law when it reversed the jury verdict exonerating petitioners from liability. Regardless of whether respondent had violated the

state Privacy Act, the objective circumstances known to the officers plainly established probable cause to believe that he had committed other offenses. No more was necessary to satisfy the Fourth Amendment's basic requirement of reasonableness.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CALIFORNIA AND FIFTEEN OTHER STATES AND THE COMMOMWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

If an officer has probable cause to arrest a suspect for a violation of state law, does his mistaken belief that the suspect has committed another unrelated offense affect the legality of the arrest under the Fourth Amendment?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-710

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

INTEREST OF AMICI CURIAE

The attorneys general of California and fifteen other states, as well as the Secretary of Justice of the Commonwealth of Puerto Rico, have a compelling interest in the prosecution of crime and the protection of citizenry. Those interests are thwarted when police officers are held civilly liable for lawful arrests. Accordingly, amici urge this Court to reverse the decision of the Ninth Circuit Court of Appeals in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003).

SUMMARY OF ARGUMENT

In *Alford*, the Ninth Circuit permitted the mistaken, subjective beliefs of the arresting officers to invalidate an arrest, despite the existence of probable cause to believe the suspect had committed another offense. In denying the officers' claim of qualified immunity, the court set out what it referred to as "the test applied in the Ninth Circuit": "probable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the

same conduct for which the suspect was arrested." *Alford*, 333 F.3d at 976 (original italics). Under this doctrine, if both offenses are not closely related, the officer's mistaken belief -- even if made in good faith and supported by the judgment of a deputy prosecutor, as here -- will expose him to civil suit under 42 U.S.C. § 1983.

No decision of this Court has ever held that an officer's subjective belief can invalidate an arrest despite the presence of probable cause to believe that the suspect committed an unrelated offense. Indeed, such a doctrine is plainly contrary to the recent decisions of this Court, which have steadfastly refused to consider the actual motivations or beliefs of the arresting officer. No degree of relation is required between the offense that motivates the officer to arrest and the offense for which probable cause actually exists. Accordingly, this Court should extinguish the closely related offense doctrine and reverse the Ninth Circuit's finding of liability against the Washington police officers who properly arrested Alford.

ARGUMENT

ALFORD'S ARREST WAS PROPER BECAUSE THE WASHINGTON PATROL OFFICERS HAD PROBABLE CAUSE TO BELIEVE THAT ALFORD HAD CRIMINALLY IMPERSONATED A POLICE OFFICER

When Washington State police officers arrested Alford on the evening of November 22, 1997, they had probable cause to believe that he was guilty of criminally impersonating a police officer, a misdemeanor under Washington law.[1/] Officer Joi Haner had received a report that Alford had activated wig-wag lights on his vehicle when pulling up behind a disabled vehicle on the side of the road, leading the people at the scene to

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1. Washington law provides, in pertinent part:

> A person is guilty of criminal impersonation in the second degree if the person:
> (a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and
> (b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person would believe the person is a law enforcement officer.

Wash. Rev. Code § 9A.60.040.

Petitioners also presented evidence at the district court that probable cause existed to believe that Alford's evasive, if not dishonest, answers regarding the activation of his wig-wag lights constituted criminal obstruction, a misdemeanor. J.A. 107-108, 157; *see* Wash. Rev. Code § 9A.76.020.

conclude that he was a police officer. *Alford*, 333 F.3d at 974-75; J.A. 34, 96, 97. After pulling him over and noting the law enforcement trappings inside his car -- a police scanner, a microphone, a radio broadcasting the dispatches of the local sheriff's office, and a pair of handcuffs -- Officer Haner became concerned that Alford was a "wannabe cop," a conclusion echoed by Sergeant Devenpeck after he arrived. *Alford*, 333 F.3d at 974-75; J.A.10, 34-35. When the officers saw that Alford was secretly tape recording their conversation, they placed him under arrest. *Alford*, 333 F.3d at 975; J.A. 36-37, 40-42.

The objective facts clearly establish probable cause for a reasonable officer to believe that Alford had committed second degree criminal impersonation. Thus, Officer Haner and Sergeant Devenpeck could have arrested Alford on this basis. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001); Wash. Rev. Code § 10.31.100 [authorizing warrantless arrest for misdemeanors committed in the presence of the officer]. However, the officers arrested Alford for his supposed violation of a Washington statute prohibiting private conversations from being tape recorded.[2/] *Alford*, 333 F.3d at 975; J.A. 36, 42-43.

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2. After the arrest, the officers issued a notice of infraction to Alford for having unlawful wig-wag lights and wrote in their reports, under a section heading entitled "charges," that Alford had made an unlawful tape recording. J.A. 24, 32, 37-38, 43. However, it cannot be said that Alford was actually charged with making an unlawful tape recording. Like most states, Washington vests prosecutorial power with county or state entities, leaving police officers powerless to charge anything other than minor traffic offenses. *State v. Reed*, 879 P.2d 1000, 1002 (Wash. Ct. App. 1994); *see also, e.g.*, Cal. Gov. Code § 26500; *Hicks v. Board of Supervisors*, 69 Cal.App.3d 228, 241 (Cal. Ct. App. 1977) ["no one may institute criminal proceedings without the concurrence, approval, or authorization of the district attorney"], 4 W. LaFave, Criminal Procedure § 13.1(a) (2d ed. 1999).

It is undisputed that Alford did not violate any law by recording his conversation with the officers. *Alford*, 333 F.3d at 974. The officers' subjective belief regarding the illegality of the tape recording turned out to be wrong. The Ninth Circuit believes that this mistake warrants a monetary civil judgment in Alford's favor.

However, the Ninth Circuit misunderstands this Court's test for probable cause. Alford's arrest should not be invalidated on the basis of the officers' subjective beliefs regarding the scope of a tape recording statute. The proper inquiry, as this Court has made clear, is an objective one: "the objective inquiry [is] whether a reasonable officer *could have believed*" that a crime had occurred. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) [italics added]. The use of the phrase "could have believed" avoids reference to the arresting officer's actual state of mind and instead focuses on the objective presence of facts. Accordingly, the vantage point is that of an objectively reasonable officer, not an actual one, as this Court has made clear: "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (*quoting Scott v. United States*, 436 U.S. 128, 136 (1978)); *see also Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) ["we examine the events leading up to the arrest,

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In any event, whether or not Alford was eventually charged with any particular offense is of no moment because it has no bearing on the legality of his arrest. *Fletcher v. Town of Clinton*, 196 F.3d 41, 54 (1st Cir. 1999); *Perry v. Jones*, 506 F.2d 778, 780 (5th Cir. 1975); *United States v. Goeltz*, 513 F.2d 193, 197 (10th Cir. 1975). The determination of whether probable cause supports an arrest cannot be altered by subsequent evidentiary developments or discretionary choices by prosecutors.

and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause"]; *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) ["the court must apply an objective test"]. In fact, as a leading commentator in the field of criminal procedure explains, "if the objective probable cause test is met it is not also necessary to establish that the particular officer making the arrest . . . subjectively believed probable cause was present." 2 W. LaFave, Criminal Procedure § 3.3(b) (2d ed. 1999).

This Court has made it clear that an arrest will not be invalidated on the basis of an arresting officer's subjective beliefs or actual motivations so long as there are objective facts amounting to probable cause. For example, in *Whren v. United States*, 517 U.S. 806 (1996), squad officers patrolling a "high drug area" stopped a car after witnessing suspicious behavior by its occupants. *Id.* at 808. When an officer approached the car, he saw two large plastic bags of crack cocaine in the hands of Whren, the passenger. *Id.* at 808-09. At trial, Whren challenged the legality of the stop under the Fourth Amendment. *Id.* at 809-10. Whren claimed that even though the officers had probable cause to stop the car for traffic violations, those reasons were a pretext for the actual, subjective motivation behind the stop -- the investigation of drug activity -- for which the officers lacked probable cause. *Id.* at 810. Whren asked this Court to consider the actual motivation behind the traffic stop and invalidate it if it could be shown to be a pretext. *Id.* at 808, 811.

In a unanimous decision, this Court rejected Whren's argument, explaining that an officer's actual motive cannot invalidate objectively justifiable behavior. *Whren*, 517 U.S. at 812. "Subjective intentions," this Court stated, "play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. So long as an officer's action is supported by objective

circumstances, the officer's "state of mind" is irrelevant.[3] *Id.* Stated another way, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814 (original italics). Accordingly, the stop at issue was validated by the presence of probable cause to support the traffic violations, regardless of the actual motivations of the officers. *Id.* at 819.

To be sure, *Whren* involved a traffic stop, but five years later, in *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001), this Court forcefully reiterated *Whren*'s holding in the context of an arrest. In a per curiam opinion, this Court reversed the Arkansas Supreme Court's invalidation of an arrest on the basis of an officer's "improper subjective motivation." *Id.* at 772. Again, this Court disapproved any consideration of the arresting officer's "actual motivations" within Fourth Amendment analysis. "The Arkansas Supreme Court's holding . . . cannot be squared with our decision in *Whren*, in which we noted our 'unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,' and held unanimously that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" *Id.* at 771-72.

Thus, an officer's subjective belief is immaterial to the determination of probable cause. Indeed, to additionally require

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3. The *Whren* decision did note that inventory searches and administrative inspections fall outside this rule because both are conducted in the absence of probable cause. *Whren*, 517 U.S. at 811-12. The Court also noted that the selective enforcement of law on the basis of race, for example, would be an exception to this rule, though such a claim would be brought under the Equal Protection Clause, not the Fourth Amendment. *Id.* at 813. None of these exceptions applies to the instant case.

an arresting officer to actually hold a subjective view of certain facts or their legal significance actually creates a two-part standard requiring both an objective and a subjective standard: first, certain facts must objectively exist; and, second, the officer must actually grasp them and their legal significance. Such a two-part test, with both an objective and subjective component, contravenes the standard set forth in this Court's decisions in *Maryland v. Macon*, *Wilson v. Layne*, *Maryland v. Pringle*, and *Thompson v. Keohane*, and it ignores this Court's holdings in *Whren* and *Sullivan*. Under the rules set out in these decisions, the objective existence of probable cause to believe that Alford had committed misdemeanor second-degree criminal impersonation sufficed to validate his arrest; in contrast, the officers' subjective misunderstanding regarding the legality of the tape recording is immaterial. Regardless of the officers' subjective intent, the arrest was reasonable.

Rather than simply asking whether the objective facts of the case supported probable cause, the Ninth Circuit further erred by applying the closely related offense doctrine to the facts of the case, stating that "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976 [italics in original]. Noting that an impersonation charge would have been based on conduct unrelated to the mistaken tape recording charge, the court found that the closely related offense standard was not met here. *Id.*

The Ninth Circuit's closely related offense doctrine finds no basis in this Court's jurisprudence. In *Alford*, the Ninth Circuit refers to it as "the test applied in the Ninth Circuit" and cites its own prior decision in support of the doctrine. *Alford*, 333 F.3d at 976, *citing Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994). However, *Gasho*, like other circuit court decisions citing the closely related offense doctrine,

cannot trace the doctrine to any controlling authority from this Court.[4] Indeed, the doctrine is often traced back to the case of *Mills v. Wainwright*, 415 F.2d 787, 789-90 (5th Cir. 1969), where the Fifth Circuit found the police tactic of arresting a suspect on a lesser charge for the purpose of investigating his involvement in an unrelated, more serious offense to be an "evil" means of discovering evidence, a "sham" and a "fraud." *Id.* at 790. The closely related offense doctrine, explained the court, served to prevent such "evil" investigatory tactics by preventing suspects from being arrested on unrelated grounds for investigatory purposes, even if probable cause otherwise existed to justify the suspect's arrest on the unrelated charge. *Id.*

The court's attempt in *Mills v. Wainwright* to use the closely related offense doctrine to discern and evaluate the purpose of an arrest under the Fourth Amendment cannot be reconciled with this Court's decisions in *Whren* or *Sullivan*. The arrest in *Whren* was valid despite the fact that the traffic violations, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Likewise, the vehicle code violations in *Sullivan*, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Yet the arrest in *Sullivan* was also proper under the Fourth Amendment. In neither decision did the lack of a close relation between the offenses render the arrest invalid.

That the officers in *Whren* and *Sullivan* may have been motivated to further detain the suspects in order to investigate drug activity was immaterial. Rather, in these and similar cases,

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4. Amici find only a single reference to the doctrine in all of this Court's jurisprudence, and that reference is in a dissent that predates *Whren*. *United States v. Watson*, 423 U.S. 411, 435 (1976) (Marshall, J., dissenting).

this Court has expressly refused to allow the purpose of the detention to invalidate the detention. *See, e.g., United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) [an arrest will not be rendered invalid by the fact that it was a mere pretext for a narcotics search]; *see also* 3 W. LaFave, Search and Seizure § 1.4(e) (3d ed. 1996 and Supp. 2004). In short, if probable cause exists to arrest a suspect, an investigatory purpose will not invalidate the arrest.

The Ninth Circuit claims that the closely related offense doctrine protects against "later extrapolated justifications" for arrests, something the court suggests occurred in the instant case. *See Alford*, 333 F.3d at 976 ["Since they did not have probable cause to arrest Alford for violating the Privacy Act, defendants now claim on appeal that they had probable cause to arrest Alford for offenses other than tape recording . . ."]. However, it is not exactly clear what is meant by -- or wrong with -- "later extrapolated justifications." If the Ninth Circuit is troubled by the fact that Alford's arrest can be upheld on grounds (i.e., an impersonation charge) other than those that appeared to have actually motivated the officers to take Alford into custody (i.e., the supposedly illegal tape recording), the Ninth Circuit's concerns are unfounded. This Court has explained that a state may seek to justify an arrest by proving the existence of probable cause, even where officers subjectively believed their actions were justified on a different basis. *Florida v. Royer*, 460 U.S. 491, 507 (1983); *see also* 3 W. LaFave, Search and Seizure § 5.1(e) (3d ed. 1996 and Supp. 2004) ["Indeed, arrests are not infrequently upheld on bases other than asserted by police at the suppression hearing."]. If objective facts amount to probable cause, the arrest is proper regardless of the reason cited by the officer.

In fact, several states have statutes that expressly uphold an arrest regardless of the reason cited by the officer. *See, e.g.*, Del. Code Ann. tit. 11, § 1905 (1953) ["If a lawful cause of

arrest exists, the arrest is lawful even though the officer charges the wrong offense or gives a reason that does not justify the arrest"]; N.H. Rev. Stat. Ann. § 594:13 (1986) [same]; R.I. Gen. Laws § 12-7-5 (1981) ["If a lawful cause of arrest exists, the arrest shall be lawful even though the officer made the arrest on an improper ground"]. In other states, courts have reached the same conclusion. *See, e.g., State v. Loh*, 618 N.W.2d 477, 479 (N.D. 2000) [if arrest is properly supported by probable cause for a certain offense, the arrest is not vitiated by the officer's subjective reliance on an offense for which there is no probable cause]; *State v. Hollis*, 633 A.2d 1362, 1365 (Vt. 1993) ["when an officer's arrest is properly supported by probable cause to arrest for a particular offense, neither the officer's subjective reliance on an offense for which there is no probable cause, nor the officer's verbal announcement of the wrong offense, vitiates the arrest"].

In contrast to the closely related offense doctrine, which focuses on the reason cited by the arresting officer, these statutes and cases provide a basis for prosecutors to justify an arrest "by proving the existence of probable cause, even where officers subjectively believed their actions were justified on a different basis." *Royer*, 460 U.S. at 507. Because they correctly determine probable cause based on objective facts rather than the articulations or beliefs of the arresting officer, these statutes and cases conform to the decisions of this Court and find support from distinguished commentators. *See, e.g.*, ALI Model Code of Pre-Arraignment Procedure, § 120.1(2), Commentary at 290-291 (1975) ["An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed"]. Indeed, it makes little sense to hold officers liable for citing the wrong reason in support of an arrest when there is no constitutional right to be informed of the reason for arrest in the first place. *Burchett v. Kiefer*, 310 F.3d 937, 947 (6th Cir. 2002); *Jones v. City of Jackson*, 203 F.3d

875, 880 (5th Cir. 2000); *Williams v. Schario*, 93 F.3d 527, 529 (8th Cir. 1996); *Kladis v. Brezek*, 823 F.2d 1014, 1018 (7th Cir. 1987).

However, despite their conformity to this Court's jurisprudence, these state court statutes and decisions do not insulate state police officers from civil liability imposed by federal circuit courts applying the closely related offense doctrine. *Compare, e.g., Hatcher v. State*, 410 N.E.2d 1187, 1189-90 (Ind. 1980) [properly concluding that probable cause is determined from the vantage point of a hypothetical officer and that an officer's actual reason for the arrest is immaterial] and *People v. Corrigan*, 473 N.E.2d 140, 143 (Ill. App. Ct. 1985) ["when an officer makes an arrest which is properly supported by probable cause to arrest for a certain offense neither his subjective reliance on an offense for which there is no probable cause, nor his verbal announcement of the wrong offense vitiates the arrest"] *with Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993) [applying the closely related offense doctrine]; *compare* R.I. Gen. Laws § 12-7-5 (1981) *with Sheehy v. Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) [applying the closely related offense doctrine]; *compare People v. Rodriguez*, 53 Cal.App.4th 1250, 1266-67 (Cal. Ct. App. 1997) ["the test is not whether a reasonable officer would have made the arrest for the reasons given"] *with Alford*, 333 F.3d at 976. Washington is not alone in its concern that its police officers face unjustified lawsuits. This Court should extinguish the closely related offense doctrine so that state police officers will no longer face civil liability for making lawful arrests.

In this case, the Washington police officers acted reasonably and in good faith. They had probable cause to believe that Alford was guilty of second degree criminal impersonation. The lack of a close relationship between the impersonation offense and the supposed tape recording offense should not invalidate the arrest. This Court should extinguish

the closely related offense doctrine and reverse the decision of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the decision of the Ninth Circuit below.

Dated: June 17, 2004

Respectfully submitted,

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IN THE

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GERALD DEVENPECK, ET AL.,

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Respondent Jerome Anthony Alford was pulled over when motorists reported that Alford's vehicle was outfitted with "wig-wag" headlights creating the impression of a police car. The officers, Petitioners Gerald Devenpeck and Joi Haner, noticed a portable police scanner, a radio broadcasting the communications of the sheriff's office, and a set of handcuffs in his vehicle. When the officers asked Alford to demonstrate the wig-wag headlights, he claimed he was unable to do so, even though they were easily activated with the press of a button near the steering wheel. The officers also discovered that Alford had been surreptitiously tape recording their conversation with a hidden recorder.

The officers arrested Alford for the tape recording, but exercised their discretion not to charge him at that time with impersonating an officer or with obstructing their investigation. When the tape recording charge was later dismissed, Alford sued the officers, alleging that he was arrested without probable cause. The Ninth Circuit held that even if probable cause existed to arrest Alford for impersonation and obstruction, the arrest nonetheless violated the Fourth Amendment because those offenses were not "closely related" to the tape recording offense. The Ninth Circuit also reversed the jury's verdict granting the officers qualified immunity.

Amicus will address the following questions:

1. Whether an officer who has probable cause to arrest for two offenses commits an unconstitutional seizure if his subjective motivation in making the arrest is a mistaken belief that he has probable cause to arrest for a third offense.

2. Whether, for purposes of qualified immunity, the law can be deemed "clearly established" on the basis of a single decision from an intermediate state appellate court from outside the area where the challenged conduct occurred.

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BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for the Community Interest ("CCI") is a national, not-for-profit organization dedicated to public safety and urban quality of life. CCI works with public officials and community groups across the country to develop and defend policies that strike a common-sense balance between the rights of the individual and the needs of the larger community. CCI has participated in a wide range of public safety and quality of life cases before this Court and other courts throughout the country, and has developed model legislation, policies, and internet resources that help communities address problems such as illegal gangs, disorder in public spaces, nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods.

CCI has participated as *amicus* before this Court in several recent cases involving the Fourth Amendment and questions of criminal procedure, including *United States v. Knights*, 534 U.S. 112 (2001), *Dickerson v. United States*, 530 U.S. 428 (2000), *Chicago v. Morales*, 527 U.S. 41 (1999), and *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998). CCI is concerned that the Ninth Circuit's decision in this case, if allowed to stand, would endanger public safety and needlessly hamper law enforcement by exposing police officers to personal civil liability for making lawful arrests supported by probable cause.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, CCI states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than CCI or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. Factual Background

This case arises from a traffic stop and arrest that occurred by the side of a darkened highway in Washington state on a rainy evening in November, 1997. State Trooper Joi Haner was on duty when he noticed Alford's car pulling in behind a disabled vehicle parked on the shoulder. Trial Transcript ("Tr.") 202. Haner made a U-turn and drove back to see if the stranded motorists needed his assistance. *Id.* He pulled in behind the vehicles and as he was walking toward them, he encountered respondent Alford, who told him that the stranded motorists had a flat tire and needed a flashlight. *Id.* Haner noticed that Alford appeared to be in a hurry; Alford did not stop or pause to speak with Haner, but simply walked past the officer and got into his car. *Id.* at 202-03.

Haner approached the stranded car and discovered it contained two men. *Id.* at 203. The two men asked the trooper whether respondent Alford was a police officer. *Id.* at 204. When Haner asked what gave them that impression, they told him that Alford's vehicle had wig-wag headlights—*i.e.*, headlights that flash alternately—and that they had concluded that Alford was an officer. *Id.* At that moment, Alford's car was pulling out past them onto the highway. Haner pointed out the car and asked the motorists to confirm tha. that was the vehicle in question. The motorists said, "[y]eah, we thought he was a cop." *Id.*

After making sure the motorists had everything they needed to change their tire, Haner got back into his vehicle and drove off after Alford. Haner explained that his purpose was to "investigate [why] he had wig-wag headlights and why he was leaving the impression with these people that he was a police officer." *Id.* at 204-05 ("I was kind of having some concerns as far as what [Alford's] intentions were and some fears for public safety . . . if he's pulling in behind cars and leaving an impression that he's a police officer."). As he drove, Haner contacted his supervisor, Sergeant Gerald Devenpeck, and asked for assistance. Haner testified that "I

thought I might have an impersonator or a 'wanna be' cop, so to speak, and I wanted the supervisor there because I did not know what I was going to be getting into." *Id.* at 206.

Trooper Haner caught up with Alford and pulled him over to the side of the road. He was unable to run a check on Alford's license plate because it was obscured by a dark, tinted cover. *Id.* at 209. Haner approached the vehicle from the passenger side and spoke with Alford through the open window. *Id.* at 210.

Haner immediately noticed that Alford had a police-band radio in his vehicle broadcasting the communications of the Kitsap County sheriff's office. *Id.* Attached to the radio was a microphone. *Id.* at 211. Haner also noticed a pair of handcuffs in the back seat. *Id.* at 212.

Alford began by telling Haner that he used to be a police officer in Texas—a statement Alford later admitted was a lie. *Id.* at 137-38 (Alford testimony that his claim to have been a Texas officer "was not the truth" and that he lied in hopes that Haner "would just cut me a little bit of slack, professional courtesy"), 213. Haner asked about the wig-wag headlights, and Alford asserted that they were part of a recently-installed alarm system on his vehicle. *Id.* at 214.

Haner then asked Alford to demonstrate the wig-wag headlights. Alford kept pushing different buttons on his key chain, but was seemingly unable to activate them. *Id.* at 214-15. Haner suspected that Alford was not making an honest effort to turn them on. *Id.* at 214 (Haner testimony) ("As [Alford] was going through it more and more, I was believing that he was being a little more evasive and he wasn't trying to turn them on. He was trying to avoid it."). Alford was never able to activate the headlights. Later, the police activated the headlights by pushing a button built into the car's dashboard and confirmed that they "looked identical" to the wig-wag headlights on a patrol car. *Id.* at 230, 310.

Sergeant Devenpeck arrived on the scene and the two officers conferred by Haner's vehicle. Haner advised his supervisor that he "suspected [Alford] had wig-wag headlights

but was being evasive and not turning them on." *Id.* at 217. Haner further explained that Alford "had the police frequencies, the handcuffs, and other things; that he left the impression that he was a police officer with the people who were disabled." *Id.*

Devenpeck approached Alford's vehicle and began questioning him through the open passenger-side window. Alford told Devenpeck that his use of the wig-wag headlights had been authorized by the Kitsap Country sheriff's office. *Id.* at 312-13. At one point in the conversation, Alford moved his arm and dislodged a jacket on the passenger seat, revealing a tape recorder that was recording the conversation. *Id.* at 301.

Devenpeck told Alford that he was under arrest for unlawful tape recording in violation of Washington's Privacy Act, and Haner removed Alford from the vehicle. *Id.* at 301. Alford asserted that his tape recording was lawful. *Id.* at 307.

Devenpeck reviewed the text of the Privacy Act to confirm that his view of the law was correct and that Alford's was wrong. *Id.* at 312. Devenpeck also made a series of calls from the field. First, he called the Kitsap County sheriff's office in an effort to validate Alford's claim that the sheriff had authorized his use of the headlights. Devenpeck spoke with a sergeant in the office who said he knew nothing about it. *Id.* at 312-13.

Devenpeck then called a trooper to obtain the home phone number of Mark Lindquist, the deputy Washington State prosecutor who would be handling the case. Devenpeck obtained the number and left a message on Lindquist's answering machine. *Id.* at 314. Devenpeck called back a few minutes later and this time the prosecutor answered. Devenpeck summarized what had happened and read the text of the Privacy Act over the phone. *Id.* at 315. Lindquist advised Devenpeck that the arrest was a "good arrest" and supported by probable cause. *Id.* at 316.

Lindquist also advised Devenpeck that there existed probable cause for obstructing an officer's investigation "based on the runaround the guy gave you," as well as for

impersonating a police officer. *Id.* at 319 (Devenpeck); *id.* at 363 (Lindquist) ("we also discussed possible impersonation of an officer charge here and possible false representation to an officer"). Devenpeck cautioned Lindquist, however, that "the State Patrol doesn't stack charges." *Id.* at 320.

At the jail, Alford was booked on the Privacy Act charge and issued a notice of infraction for the wig-wag headlights. *Id.* at 239-41; Joint Appendix 24-25.

2. Proceedings in the Lower Courts

The Privacy Act charge was later dismissed, and Alford sued Devenpeck and Haner under 42 U.S.C. § 1983, alleging that the arrest violated his Fourth Amendment right to be free from unreasonable seizure. A jury found for the officers and the district court denied Alford's motion for a new trial.

The Ninth Circuit reversed. The court held that the officers lacked probable cause to arrest Alford for violating the Privacy Act, and that the presence of probable cause to arrest for impersonation or obstruction could not cure the Fourth Amendment violation. *See* 333 F.3d 972, 976-77. In reaching this conclusion, the court relied on the "closely-related offense" rule, which provides that if there was not probable cause to arrest for the crime articulated by the officer at the time of the arrest, the arrest is constitutional *only* if probable cause existed for a "closely related" offense that "involves the same conduct for which the suspect was arrested." *Id.* at 976 (quotation and emphases omitted). The court reasoned that because "[a]ny impersonation charge would be based on Alford's use of wig-wag headlights," and because "[a]n obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how," these offenses did not qualify as "closely related" and could not justify the arrest. *Id.*

The court also held that the officers were not entitled to qualified immunity. The court found that Washington caselaw permitting the tape recording of a traffic stop was clearly established, and that the officers' conduct was not objectively

reasonable. *Id.* at 977-79. The court concluded that "[b]ecause in light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, defendants were not entitled to immunity." *Id.* at 979.

Judge Gould dissented, pointing out that "the determination of reasonableness is in the province of the jury" and that the officers "quite obviously were doing their job to protect the public." *Id.* He noted that the officers "stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least." *Id.* Moreover, the "officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted." *Id.* at 980. In short, "[t]he officers did not arrest Alford on a rogue mission, nor motivated by malice, nor on a whim; instead, they provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him." *Id.*

Judge Gould stated that "[t]he reason that the arrest turned out to be illegal here was that the broad literal text of the privacy statute had been interpreted restrictively by an intermediate state appellate court in an opinion that was not known by the officers or familiar to the prosecuting attorney." *Id.* at 981. Accordingly, he concluded, where the officers' "mistake was that they interpreted a state statute literally despite a state court ruling that had narrowed it," the jury's determination that the officers' conduct was reasonable should not be disturbed. *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the decision below and declare the closely-related offense rule a dead letter in the wake of *Whren v. United States*, 517 U.S. 806, 812 (1996), which recognized that "an officer's motive [cannot] invalidate[ ] objectively justifiable behavior under the Fourth Amend-

ment." The closely-related offense rule improperly focuses on the officer's motivation in making the arrest by asking whether the offense that prompted the arrest is closely related to an offense for which probable cause existed. The rule results in erroneous findings that the Fourth Amendment was violated in cases like this one, where the officers engaged in "objectively justifiable behavior" and the challenged arrest *was* supported by probable cause. This Court should hold that an arrest is constitutional if the facts and circumstances known to the officers at the time of the arrest would give rise to probable cause to arrest for *any* offense.

In the event it reaches the question, this Court should reverse the Ninth Circuit's determination that the arresting officers in this case were not entitled to qualified immunity. The sole basis for finding Alford had a "clearly established" right to tape record the officers was a single decision by an intermediate appellate court from a different area of Washington State that is distinguishable on its facts. In any event, the officers' conduct was objectively reasonable, as reflected in their good-faith efforts to parse the text of a broadly worded statute and in telephoning the deputy prosecutor, who confirmed that their legal judgment was correct.

ARGUMENT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This case presents the question whether the Fourth Amendment is violated when probable cause exists to make an arrest for one offense, but the officer mistakenly elects to arrest the defendant for a different offense that was *not* supported by probable cause. The Ninth Circuit held that such a seizure is constitutional only if the two offenses are "closely related" and "involve[ ] the same conduct." 333 F.3d at 976 (emphasis and quotation omitted).

I. THE CLOSELY-RELATED OFFENSE RULE IS INCONSISTENT WITH *WHREN* AND THIS COURT'S FOURTH AMENDMENT DECISIONS

The fundamental flaw in the Ninth Circuit's reasoning is that it depends on the officer's motivation in making the arrest. This methodology is inconsistent with this Court's Fourth Amendment jurisprudence, which requires an exclusive focus on the objective facts and circumstances known to the arresting officer in determining whether a seizure is "reasonable."

A. The Fourth Amendment Inquiry Considers The Objective Circumstances Of The Arrest, Not The Officer's Subjective Motivation

1. In *Whren*, this Court held that a traffic stop supported by probable cause is consistent with the Fourth Amendment, *regardless* of the police officer's motivation in making the stop. The case arose when the defendants were driving a truck in a high-drug area and were pulled over by the police. The ostensible reason for the stop was that the defendants had pulled away from a stop sign at an unreasonable speed and had not signaled when turning. The officers discovered drugs in the truck, and the defendants attempted to suppress the evidence by challenging the stop as pretextual. *See* 517 U.S. at 808-09.

In a unanimous decision, this Court rejected the suggestion "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved," and held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. The Court noted that outside the context of inventory searches or administrative inspections, it had never held that "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment," and in fact had "repeatedly held and asserted the contrary." *Id.* at 812. The Court concluded that "the Fourth Amendment's concern with

'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814.

In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), this Court held that *Whren* applies to custodial arrests as well as traffic stops. The Court squarely rejected the lower courts' conclusion that the challenged arrest, "although supported by probable cause, nonetheless violated the Fourth Amendment because [the officer] had an improper subjective motivation for making the stop." *Id.* at 771. The Court again emphasized its "unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers," and reiterated that the officers' "subjective intentions" cannot invalidate an arrest when the objective circumstances known to the officer establish probable cause. *Id.* at 771-72 (quotation omitted).

2. *Whren* and *Sullivan* follow a long line of this Court's precedent establishing that the Fourth Amendment/probable cause analysis hinges on the objective facts and circumstances known to the officer at the time, and not on the officer's subjective reasoning for making the seizure.

In *Beck v. Ohio*, 379 U.S. 89, 91 (1964), for example, the Court explained that "[w]hether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Similarly, in *Terry v. Ohio*, the Court emphasized that "in making [the Fourth Amendment] assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?" 392 U.S. 1, 21-22 (1968) (quotation omitted).

In short, the Fourth Amendment analysis focuses on what a reasonable officer *could have* believed based on the

facts available at the time; it does not depend on what the individual officer in the case *actually* believed. This principle is illustrated by *Scott v. United States*, 436 U.S. 128, 138 (1978), where the Court explained that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." The Court noted that "[a]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137.

Florida v. Royer, 460 U.S. 491 (1983), strongly supports the conclusion that the individual officers' belief as to whether probable cause existed is irrelevant to the Fourth Amendment inquiry. *Royer* presented the question whether the defendant was being illegally held at the time he gave consent to open his luggage. The State argued that the defendant was not being held illegally when he consented, because there was probable cause to arrest him at the time. *Id.* at 507. Although the arresting officer had testified at the suppression hearing that there was no probable cause to arrest until the luggage was opened, and the Court ultimately concluded that probable cause was lacking and reversed the conviction, the controlling four-Justice plurality emphasized that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying [the defendant's] custody by proving probable cause and hence removing any barrier to relying on [the defendant's] consent to search." *Id.* Three of the Justices who dissented from the reversal of the conviction apparently agreed with this analysis. *See id.* at 530 n.8 (noting that the detention "would also pass muster" under probable cause standards, but arguing that the conviction could be affirmed on other grounds, so

that "the probable-cause issue need not be decided in this case").[2]

Indeed, the rule could hardly be otherwise, for a number of this Court's cases establish that an arrest is lawful if probable cause exists even when the arresting officer himself is aware of *none* of the facts that establish probable cause. Beginning with *Whiteley v. Warden*, 401 U.S. 560 (1971), and culminating in *United States v. Hensley*, 469 U.S. 221 (1985), this Court has repeatedly emphasized that an officer may arrest a citizen based on a crime accusation that is contained in a police flyer or radio bulletin—even if the arresting officer knows nothing at all about the circumstances that establish probable cause—so long as "the officers who *issued* the flyer [or radio call] possessed probable cause." *Hensley*, 469 U.S. at 231. Based on these cases, it is by now also well established that the existence *vel non* of probable cause must be determined by assessing the objective facts *collectively* known to *all* officers involved in the investigation.[3] As this

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[2] The irrelevance of an arresting officer's subjective motivation in making the arrest is further reflected in this Court's many pre-*Whren* decisions rejecting "pretext"-based Fourth Amendment challenges. *See, e.g., United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) (traffic-violation arrest not rendered invalid by the fact it was "a mere pretext for a narcotics search"); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that the [defendant] was armed."); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (rejecting idea that officers' ulterior motive could negate legal justification for search).

[3] *See, e.g., United States v. Sandoval-Venegas*, 292 F.3d 1101, 1105 (9th Cir. 2002) ("probable cause may be based on the collective knowledge of officers at the scene of an arrest"); *United States v. Sawyer*, 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer can be imputed to the other officers under the collective knowledge doctrine."); *see also United States v. Fiasconaro*, 315 F.3d 28, 35-36 (1st Cir. 2002); *Savino v. City of New York*, 331 F.3d 63, 74 (2d Cir. 2003); *United States v. Menon*, 24 F.3d 550, 560-61 (3d Cir. 1994); *United States v. Wells*, 98

Court put it in *Illinois v. Andreas*, 463 U.S. 765, 771-72 n.5 (1983), "where law enforcement authorities are cooperating in an investigation . . . the knowledge of one is presumed shared by all."[4] It would be odd to permit courts to piece together probable cause on the basis of knowledge shared by multiple officers, but require that evidence be suppressed, or damages awarded, in cases in which probable cause *does* exist, merely because a single officer mistakenly elected to charge under a different statute for which probable cause is lacking.

3. These cases demonstrate that the Fourth Amendment protects against "unreasonable" seizures of the person, with reasonableness determined solely by the presence or absence of probable cause. *See, e.g., Robinson*, 414 U.S. at 235 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment."); *Whren*, 517 U.S. at 819 (endorsing "the traditional common-law rule that probable cause justifies a search and seizure"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Maryland v. Pringle*, 124 S. Ct. 795, 799 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if

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F.3d 808, 810 (4th Cir. 1996); *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999); *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003); *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003); *United States v. Cervine*, 347 F.3d 865, 871 (10th Cir. 2003); *Craig v. Singletary*, 127 F.3d 1030, 1042 (11th Cir. 1997) (en banc); *United States v. Williams*, 951 F.2d 1287, 1289-90 (D.C. Cir. 1992).

[4] In *Andreas*, this Court held it was "plain error" for the Appellate Court of Illinois to have refused to aggregate the knowledge of all the officers involved in the investigation, focusing instead on the level of "certainty" possessed by a single officer. *See* 463 U.S. at 771-72 n.5.

the arrest is supported by probable cause."). An otherwise "reasonable" arrest—*i.e.*, an arrest supported by probable cause—is not transformed into an "unreasonable" invasion of the person because of the arresting officer's motivation or flawed legal reasoning in making the arrest.

Seen another way, it is the presence of certain objective facts, and nothing more, that gives rise to the authority under the Fourth Amendment to seize the person. As the Eighth Circuit has explained, "[f]rom the standpoint of the individual, the figurative zone protecting his privacy and personal integrity may be encroached under the law only by facts and circumstances totaling probable cause for arrest." *Klingler v. United States*, 409 F.2d 299, 304 (8th Cir. 1969); *see also Locke v. United States*, 11 U.S. 339, 348 (1813) (the term "probable cause" "imports a seizure made under circumstances which warrant suspicion"). There is no additional requirement that the arresting officer have the "correct" motivation in effecting the seizure. Nor does the Fourth Amendment require that the arresting officer engage in the "correct" legal analysis or articulate the most precise legal justification for the seizure at the moment he makes the arrest. *Cf. Illinois v. Gates*, 462 U.S. 213, 235 (1983) (noting that law enforcement agents usually are "nonlawyers," and should not be held to the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings") (quotation omitted).

All that is required is that "at [the] moment [of the seizure] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck*, 379 U.S. at 91. As the Court said in *Pringle*, "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police offi-

cer, amount to probable cause." 124 S. Ct. at 800 (quotation omitted).[5]

B. This Court Should Reject The Ninth Circuit's Approach

The closely-related offense rule necessitates an examination of the officer's subjective motivation and/or the adequacy of his individual legal reasoning in making an arrest, directly contradicting this Court's many decisions holding that the arresting officer's motivation has no bearing on Fourth Amendment "reasonableness" determinations. This Court should hold that the proper test for whether an arrest violates the Fourth Amendment is whether it is supported by probable cause to believe that *any* arrestable offense has occurred.

1. The Ninth Circuit's approach cannot be squared with this Court's precedent. *Whren* holds that an officer's subjective motivation in making an arrest is irrelevant to the constitutional inquiry, yet the closely-related offense rule defines what is reasonable under the Fourth Amendment by reference to the specific offenses that motivated the officer to make the

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[5] It is by no means clear that the officers lacked probable cause to arrest Alford for a Privacy Act violation. In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the respondent was arrested for violating an ordinance that later was declared constitutionally void for vagueness in all of its applications. This Court nevertheless held that the officers had probable cause to make the arrest, explaining that the respondent's conduct violated the plain language of the ordinance, and that "[a] prudent officer, in the course of determining whether respondent had committed an offense . . . , should not have been required to anticipate that a court would later hold the ordinance unconstitutional." *Id.* at 37-38. The same reasoning should apply here. The fact that the Privacy Act may be judicially interpreted as inapplicable to Alford's case does not necessarily mean the officers lacked probable cause to arrest for a Privacy Act violation, given that the arrest was based on a reasonable common-sense reading of the statute and there was no definitive, controlling authority to the contrary. *See DeFillippo*, 443 U.S. at 37 (probable cause present where, at time of arrest, "there was no controlling precedent that this ordinance was or was not constitutional"). *See also* pp. 22-25 *infra*.

arrest. Under the Ninth Circuit's approach, an arrest is constitutional only if the officer's motivation in making the arrest matches up with the same or similar offenses for which probable cause existed. *Whren*, in contrast, asks simply whether the arrest is "*justifiable* on the basis of probable cause to believe that a violation of the law has occurred" (517 U.S. at 811, emphasis added)—*not* whether that justification is plausible (the question in *Whren*) or whether the officer happened to articulate that precise justification at the moment of arrest (the question presented here). *See United States v. Dhinsa*, 171 F.3d 721, 725 (2d Cir. 1998) ("A fair reading of *Whren* . . . leads to the conclusion that an observed traffic violation legitimates a stop even if the detectives do not rely on the traffic violation.").

Here, there is no question that probable cause existed to arrest Alford—at the very least—for criminal impersonation and obstructing a law enforcement officer. Alford's conduct strongly suggested that he was impersonating a policeman; indeed, he had left that exact impression with the stranded motorists. *See* WASH. REV. CODE § 9A.60.040(3)(a) ("A person is guilty of criminal impersonation in the second degree if the person . . . [c]laims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer"). As Judge Gould remarked, Alford's conduct "was ominous to say the least." 333 F.3d at 979. Moreover, Alford's admitted lying to Trooper Haner and his apparent feigning ignorance of how to activate his wig-wag headlights provided probable cause to arrest for obstruction. *See* WASH. REV. CODE § 9A.76.020 ("A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.").[6] In short,

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[6] Alford's conduct also appeared to violate WASH. REV. CODE § 46.16.240, which provides that license plates shall be attached to a vehicle "in such a manner that they can be plainly seen and read at all times." Haner testified that Alford "had a dark, smoked, tinted license plate cover making it unreadable." Tr. 209.

Alford's conduct established probable cause for *arrest*. That is the extent of the analysis required under *Whren*, and the Ninth Circuit should have gone no farther.

The closely-related offense rule is intended to smoke out sham arrests by looking to the offenses the officers identified at the time of the arrest. Implicit in the rule is the presumption that any *ex post* rationale—or at least any *ex post* rationale that is not "closely related" to the initial rationale—is likely to be nothing more than an attempt to cover up a sham. *See, e.g., Sheehy v. Town of Plymouth*, 191 F.3d 15, 21 (1st Cir. 1999) (allowing reliance on unrelated offenses "would open the door to the extrapolation of offenses in an effort to justify a sham arrest") (quotation omitted); *Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989) (officers should not be allowed "to justify what from the outset may have been actually sham or fraudulent arrests on the basis of *ex post facto* justifications that turn out to be valid").

But this ignores the clear mandate of *Whren*. This Court held that even if an arrest *is* a "sham"—in the sense that the officer's stated motive for the arrest was not the "real" motive—that fact is irrelevant to the Fourth Amendment inquiry. In reaching this conclusion, the Court rejected the defendants' proposed approach—comparing the officer's alleged motivation with what a reasonable officer would have done under the circumstances—as an "attempt to root out subjective vices through objective means." 517 U.S. at 814. Here too, the closely-related offense rule is nothing more than an "attempt to root out subjective vices through objective means," namely by requiring the officers to identify on the record all possible legal bases for the arrest at the time the arrest is made. As the Court explained in *Whren*, such an approach might make sense if the Court's Fourth Amendment precedents were based only "upon the evidentiary difficulty of establishing subjective intent." *Id.* But the Court's precedents are "not based only upon that or even principally upon that." *Id.* Rather, they are based on the notion that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* In this case, the circumstances allowed the officers to arrest Alford, *whatever* the officers' subjective intent.

Although the courts that have adopted some form of the closely-related offense rule suggest that the inquiry is "entirely objective," *see, e.g., Gassner*, 864 F.2d at 398, that is not the case. Any test that looks to the offenses the officer identifies as the basis for the arrest is inherently and unavoidably subjective, because it depends on the officer's subjective understanding of the law as applied to the facts and circumstances. In other words, the starting point for the closely-related offense rule is the offenses the officer concludes the law will support; it is the officer's initial subjective justification for the arrest that determines the scope of all possible offenses that could later provide a probable cause basis for the arrest. Such a test is profoundly subjective, not objective.[7]

2. If the closely-related offense rule is permitted to survive and co-exist alongside *Whren*, the perverse result will be

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[7] By contrast, the test applied by the circuits that disagree with the Ninth Circuit is objective, rather than subjective, in that it focuses on the facts known to the officer rather than on the officer's assessment of the legal significance of those facts. For example, in *United States v. Bookhardt*, 277 F.3d 558, 567 (D.C. Cir. 2002), the court held that "if a police officer arrests a defendant on a ground that ultimately proves invalid, the arrest is nonetheless lawful if the same officer had probable cause to arrest the defendant for a different criminal offense." Thus, "[a]s long as [the officer] had an objectively valid ground upon which to arrest [the defendant], the fact that he articulated an invalid ground does not render the arrest unlawful." *Id.* at 566. *See also Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993); *Lee v. Ferraro*, 284 F.3d 1188, 1195-96 (11th Cir. 2002). As this Court held in *Maryland v. Macon*, 472 U.S. 463 (1985), "[w]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 470-71 (quotation and citation omitted).

that an officer who arrests out of malice and admits it was based on a pretext will be deemed to have acted lawfully if the pretextual arrest is nonetheless supported by probable cause—whereas a well-meaning officer could be held personally liable if he is honest about the reason for the arrest, but has made a good-faith mistake of law. Ironically, the well-meaning officer who makes a good-faith mistake would be exposed to punishment *because* he failed to manufacture a pretextual basis for the arrest. *Cf. United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) ("We fail to see . . . why the police should be in a better position if they prevaricate about the reason for arresting a defendant than if they make an honest mistake of law.").

Here, the record reflects that Officers Devenpeck and Haner were well aware of other possible bases for the arrest—indeed, the reason Alford was pulled over in the first place was for possible impersonation of an officer—but they consciously chose *not* to "stack" additional charges against Alford. Deputy Prosecutor Lindquist testified that when he was speaking with Sergeant Devenpeck on the phone the night of the arrest, he was "floating the possibility of stacking some more charges" on Alford. Tr. 373. Devenpeck testified that Lindquist advised him to charge Alford with obstructing an officer, but Devenpeck told him that "the State Patrol doesn't stack charges .... If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation." *Id.* at 320. Had the officers arrested Alford for impersonation or obstruction in addition to the tape recording, there would have been no basis for a false arrest claim and this lawsuit would never have been brought. By treating the officers' exercise of discretion in Alford's favor as the basis for finding they violated his civil rights, the closely-related offense rule ensures that no good deed goes unpunished.

The closely-related offense rule should be rejected for the additional reason that it is unworkable in practice: it has

not been applied consistently within the lower courts, or even within the Ninth Circuit itself. The main problem lies in determining the precise scope of conduct that may be considered in determining whether two offenses are "related." For example, in this case, the Ninth Circuit held that the two offenses must "involve[ ] the *same conduct*." 333 F.3d at 976. But in *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003), the court framed the test as requiring that the two offenses involve "the same *course of conduct*." *Id.* at 951 (emphasis added). The outcome of this case thus turned on which version of the Ninth Circuit test was applied, in that impersonation and obstruction charges may not have involved the same "conduct" as the tape recording charge, but they clearly arose from the same "course of conduct."

An additional problem lies in the difficulty of articulating a rule that can specify *how* closely related two offenses must be in order to qualify as "closely related." Under the Ninth Circuit's rule, as Judge Reinhardt explained in *Bingham*, "in order for an alternate justification for the arrest to be upheld, it must be closely related—the *more* closely related the offenses, the more likely the arrest to be lawful." 341 F.3d at 955 (Reinhardt, J., dissenting). Such a vague rule provides law enforcement officers with no meaningful guidance as to when an arrest may cross the line from constitutional to unconstitutional, and the decisions of other circuits that have adopted some form of the rule are similarly opaque. *See, e.g., Avery v. King*, 110 F.3d 12, 14 (6th Cir. 1997) (construing "closely related" standard as requiring that offenses be "in some fashion related") (quotation omitted); *Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982) (observing that the definition of "related" has been "left for case law development").

Another area of confusion is whether the offenses that provided the basis for the arrest should be determined by what the officer announces at the scene, or by the offenses cited when the suspect is brought to the police station for booking. *Compare Sheehy v. Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999) ("related crimes analysis should focus

on the conduct underlying the crime cited by the officer at the time of the arrest") with *Richardson v. Bonds*, 860 F.2d 1427, 1430 (7th Cir. 1988) ("[i]f statements made by the officer at the time of the arrest were used as an indication of the offense for which the officer believed probable cause existed, officers could simply remain silent as to the basis for the arrest") and *Klingler v. United States*, 409 F.2d 299, 306 (8th Cir. 1969) ("The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law, following the heat of a chase, to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.") (quotation omitted).

This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet virtually any formulation of a closely-related offense rule will cause uncertainty in the field, and result in far more occasions for constitutional review, as courts and juries struggle to determine what the exact "conduct" was in a particular case, what the precise offenses were that formed the basis for an arrest (and when they were articulated), and whether those offenses are "closely related" or merely "related." As this Court explained in *Atwater*, "the object in implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Id.*

Finally, the closely-related offense rule should be rejected because it makes no sense from a policy perspective and will have harmful consequences not just for officers, but for criminal defendants as well. The rule creates an incentive for police officers to stack charges against suspects as a way of insulating the arrest from Fourth Amendment challenge—and of protecting themselves against personal liability—in

the event a particular charge does not "stick." As the D.C. Circuit recognized in *Bookhardt*, the closely-related offense rule does "no more than create an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive'—yielding no additional protection of civil liberties while adding considerably to the burden placed upon both defendants and police." 277 F.3d at 566 (quoting *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971)). "Such a clogging of the criminal process already heavily encumbered, would be pointless." *Atkinson*, 450 F.2d at 838.

By incentivizing officers to charge every possible offense supported by probable cause, the closely-related offense rule undermines the discretion law enforcement officers have traditionally exercised. The United States Attorneys' Manual states that "[i]t is important to the fair and efficient administration of justice in the Federal system that the government bring as few charges as are necessary to ensure that justice is done" and that "[t]he bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive . . . exercise of power." Manual at § 9-27.320(B). Under the guise of protecting the rights of criminal suspects, the Ninth Circuit's approach actually limits officers' ability to exercise their discretion *in the suspects' favor* by not charging every possible offense.

II. THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY MUST BE REVERSED

This Court has recognized that qualified immunity leaves "ample room for mistaken" but nonetheless reasonable "judgments" by police officers concerning legal requirements. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). Even where an officer's conduct violates the Constitution, the officer is immune from personal liability unless "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional.

Id. at 341. "[I]f officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Id.* Accordingly, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson*, 483 U.S. at 641).

Because the Ninth Circuit erred in finding a constitutional violation, the court's denial of qualified immunity must be reversed on that basis alone. But the court's decision is erroneous for several additional reasons, primarily because the law in question was not "clearly established" and because the officers' conduct was objectively reasonable in any event.

A. The Officers Did Not Violate "Clearly Established" Law

The Ninth Circuit erred in deeming it "clearly established" that Alford's tape recording was lawful under Washington's Privacy Act. *See* 333 F.3d at 977. This Court has explained that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). *See also Anderson*, 483 U.S. at 640 ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.").

In this case, the relevant inquiry is whether a reasonable officer could have believed that arresting Alford for violating Washington's Privacy Act was lawful, in light of clearly established law and the information the officers possessed. The

answer to that question is plainly yes. The statute, which applies to "private" conversations, can reasonably be construed to encompass a conversation occurring at night time on a desolate stretch of road, with no third parties present and no passers-by in the vicinity. *See* WASH. REV. CODE § 9.73.030(1)(b) ("it shall be unlawful for any individual . . . to intercept or record any . . . [p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all persons engaged in the conversation"). To be sure, the fact that one of the parties to the conversation is a police officer acting in the course of his official duties may have a bearing on whether the conversation can properly be deemed "private" as a matter of law. But the text of the statute offers no guidance on this point. Although there is a provision exempting reporters, *see* WASH. REV. CODE § 9.73.030(4), there is no similar exception for police officers.

In any event, the Ninth Circuit's basis for deeming the law "clearly established" was not the text of the statute itself, but a 1992 decision from an intermediate Washington appellate court construing and narrowing the statute, *State v. Flora*, 845 P.2d 1355 (Wash. App. Div. 1 1992). *Flora* held that, at least in certain circumstances, the Privacy Act was not violated when an individual tape recorded his conversation with police officers.

Even taking *Flora* for all it might be worth—*i.e.*, as a rule of law exempting the taping of police officers from the reach of the Privacy Act—a single case from an intermediate state appellate court is not sufficient to "clearly establish" the legal rule in question. That is particularly true here, where the court in question was not the appellate court for the area where the arrest occurred.[8] In *Wilson v. Layne*, this Court

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[8] Washington State is divided into three appellate divisions, and a decision from one appellate division is not binding on the others. *See, e.g.*, *Joyce v. State Dep't of Corrections*, 75 P.3d 548, 559 n.9 (Wash. App. Div. 2 2003) (case from another division "is merely persuasive authority and is not binding on us"), *review granted*, 84 P.3d 1229 (Wash. 2004).

held that a rule was not "clearly established" when "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. 603, 617 (1999). So too here: the decision in *Flora* was not binding on the appellate court for the area of Washington state where the arrest was made. Aside from *Flora*, the Ninth Circuit identified no other case reaching the same result, let alone a "consensus of cases."

Moreover, *Flora* is clearly distinguishable on its facts, in that the court's conclusion that the taped conversation was not "private" apparently depended, at least in part, on the presence of a third party and passers-by. Indeed, the court stated that it was rejecting the view "that public officers performing an official function on a public thoroughfare *in the presence of a third party and within the sight and hearing of passersby* enjoy a privacy interest which they may assert under the statute." 845 P.2d at 1357 (emphasis added). The court then commented that "[d]etermining whether a given matter is private requires a fact-specific inquiry," thus undercutting any suggestion that it was creating a *per se* rule applicable to police officers conducting official business. *Id.*

The Supreme Court of Washington does not appear ever to have embraced a rule of law that a citizen *always* has a right to tape record his interactions with police. In its only discussion of *Flora*, the court emphasized that it was the public nature of the arrest, and the presence of a third party, that rendered the Privacy Act inapplicable in that case. *See State v. Clark*, 916 P.2d 384, 392-93 (Wash. 1996) (describing *Flora* as standing for the proposition that "a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private").[9] The court explained that "[t]he officers in *Flora* had no personal privacy interest in statements made as public officers effectuating an arrest in public" because "the presence of another person during the conversation means that the matter is not secret or confidential." *Id.* at 393.

In short, even if the law required officers to parse through all conceivably applicable precedents before making an arrest—and to do so with the discrimination of an Oxford don—it would be impossible to say that petitioners' conduct violated any "clearly established" principle of Washington law.

B. The Officers' Conduct Was Objectively Reasonable

The jury concluded that the officers' conduct was objectively reasonable and ruled in their favor. The Ninth Circuit's conclusion to the contrary cannot be sustained.

The undisputed evidence established that Sergeant Devenpeck reviewed the text of the Privacy Act while at the scene. Tr. 312. He then called a trooper in order to obtain the phone number of the deputy prosecutor, whom he had to telephone twice before finally reaching him at home. *Id.* at 314. Devenpeck read the text of the Act to the prosecutor over the phone, and the prosecutor seconded Devenpeck's judgment that the arrest of Alford was supported by probable cause. *Id.* at 316. As Judge Gould recognized, the officers "reasonably believed Alford's tape recording of the traffic stop was outlawed by the Washington Privacy Act," and their conduct "provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating." 333 F.3d at 980.

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[9] *Clark* involved the reverse situation of that presented here: in *Clark*, the *officers* had taped the *suspects'* interactions with a police informant, and the suspects sought to suppress the recordings under the Privacy Act.

"Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law," *Butz v. Economou*, 438 U.S. 478, 507 (1978), and the fact that the prosecutor agreed that Alford violated the Privacy Act is an objective benchmark indicating that the officers' mistake of law was a reasonable one. That the officers were unaware of the *Flora* decision cannot render their conduct objectively unreasonable. The officers looked to the best source of authority available—the statute itself—and confirmed their probable cause assessment with an attorney presumably an expert in criminal law—the prosecutor. They trusted the prosecutor's judgment. This Court has long "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Because "[u]nder settled law, [Devenpeck and Haner] are entitled to immunity if a reasonable officer could have believed probable cause existed to arrest [Alford]," *Hunter*, 502 U.S. at 228, the Ninth Circuit's denial of immunity must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

GERALD DEVENPECK, *et al.*,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an arrest that violates the Fourth Amendment – because the specific and articulable facts that impelled the arrest did not establish objective probable cause to believe the charged offense had been committed – can be justified post hoc on the basis of facts and offenses unrelated to the facts and offenses that impelled the initial arrest.

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Or. Rev. Stat. § 133.235(3) 19

S.C. Code Ann. § 17-13-50 19

Utah Code Ann. § 77-7-6(1) 19

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondent.[1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001); *Bond v. United States*, 529 U.S. 334 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

SUMMARY OF ARGUMENT

I. Respondent was arrested on the basis of facts establishing conduct that is not unlawful in the state of Washing-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

ton. That arrest cannot be justified post hoc on the basis of *other* facts that were *not* the true grounds for his arrest, but that could have justified an arrest for a different, wholly unrelated offense. In requiring petitioners to justify the arrest only on the basis of the conduct and offense for which petitioner was arrested – or at least on the basis of some closely related offense – the court of appeals adhered to fundamental Fourth Amendment principles prohibiting police officers from intruding on a private citizen's personal liberty unless the individual officer has an individualized basis for believing that the private citizen has committed a particular offense. Contrary to petitioners' submission, the "closely related offense" doctrine applied by the court of appeals does not require courts to inquire into the subjective motives of individual arresting officers and thus is not inconsistent with precedents prohibiting such inquiries. Rather, the doctrine avoids such inquiries by focusing on the objective facts and circumstances justifying an arrest, including the objectively stated grounds for an arrest. The doctrine thereby advances sound Fourth Amendment and law enforcement principles: it excuses purely technical mistakes in charging by allowing the state to rely on closely related offenses to justify an arrest (further reinforcing the focus on the objective circumstances) while precluding the state from surprising a defendant with post hoc rationalizations for an arrest that could not be legally justified on its own terms.

II. If the Court holds that petitioners cannot justify their arrest on the basis of an offense unrelated to the offense for which respondent was arrested, the Court should not address the distinct qualified immunity issue petitioners also seek to raise. Petitioners incorrectly characterize that issue as whether the close related offense doctrine was established with sufficient clarity to hold them liable for the arrest. Neither petitioners nor the courts below addressed the qualified immunity question in those terms. Rather, petitioners and both the majority and dissenting opinions assumed the question was whether petitioners had sufficient notice that respondent's arrest was unlawful under the Washington Privacy Act. And that question, in turn, is resolved by the jury instruction – unchallenged by petitioners – that it was "clearly established" at the time of the arrest that respondent's conduct did not violate the Privacy Act. Accordingly, the qualified immunity issue briefed by petitioners is not properly presented and should not be addressed by the Court.

ARGUMENT

I. BECAUSE OFFICER HANER LACKED PROBABLE CAUSE FOR BELIEVING THAT RESPONDENT VIOLATED THE PRIVACY STATUTE, RESPONDENT'S ARREST WAS UNLAWFUL

Petitioners arrested respondent for violating the Washington Privacy Act, Wash. Rev. Code Ann. § 9.73.030(1)(b), because respondent was taping his conversation with Officer Haner without Haner's consent. The Privacy Act charge was later dismissed as groundless, and the district court in this case further determined – and the jury was instructed – that it was "clearly established" at the time of the arrest that "the conduct for which [respondent] was arrested was not a violation of the Privacy Act." Pet. App. 10a. Petitioners did not challenge on appeal, and do not challenge in this Court, the propriety of this jury instruction.

It is thus undisputed that petitioners lacked probable cause to arrest respondent for violating the Privacy Act. According to petitioners, however, respondent's arrest was nevertheless lawful, because petitioners *would have had* probable cause to arrest for him for an entirely unrelated offense, *if* they had arrested him for that offense. Petitioners contend that the actual, asserted basis for the arrest is utterly immaterial under the Fourth Amendment. All that matters, they say, is whether a hypothetical, reasonable officer in the same situation would have had probable cause to arrest respondent for *any* offense.

Petitioners are wrong. Their argument depends fundamentally on a mistaken conflation of an individual officer's *subjective motives* for an arrest with the *objective basis in fact* for the arrest. The motives of an individual officer are indeed irrelevant under the Fourth Amendment, as this Court has held since its earliest days. But that is far different from holding that the factual basis for an arrest is irrelevant to Fourth Amendment analysis. It is not. As we elaborate below, this Court's Fourth Amendment jurisprudence establishes that before a police officer may arrest a person for an offense, the officer must have probable cause, supported by particularized facts, for believing that the person committed an offense. If the particularized facts that justified the arrest do not establish probable cause for believing that the person committed the offense (or one closely related), then the arrest was not justified and therefore was not lawful. The prosecutor cannot cure that unlawful arrest post hoc by pointing to *other* facts that were *not* the objective basis for the arrest, but that would have justified an arrest on entirely *different* and *unrelated* grounds.

Motives may not matter in Fourth Amendment analysis. But facts do. The facts that led to an arrest either established probable cause for that arrest or they did not. If they did, then the arrest is lawful, even if the officer had bad motives for making the arrest. If they did not, then the arrest is unlawful, even if the prosecutor can later point to different facts that could have justified a different arrest.

A. The Fourth Amendment Requires Courts To Assess Probable Cause For An Arrest On The Basis Of The Particularized Facts That Objectively Justified The Arrest

1. Petitioners' attack on the closely related offense doctrine starts – and basically ends – with the premise that probable cause is assessed by a test of "objective reasonableness," which "applies without regard to the motives of the

officers involved." Petrs. Br. 17; *see also* U.S. Br. 11. According to petitioners, that principle resolves this case: it is irrelevant that Officer Haner mistakenly identified the Privacy Act as a basis for the arrest, they say, because Officer Haner's subjective intent in arresting respondent is irrelevant to the probable cause inquiry.

That analysis rests on a misreading of this Court's cases addressing subjective motives in the Fourth Amendment context. What those cases hold is that, so long as the officer specifies an objectively reasonable basis for an arrest, a court cannot engage in a "pretext" inquiry to determine whether the officer was *actually* motivated by a different, malicious or unlawful reason for making the arrest. In *Stacey v. Emery*, 97 U.S. 642 (1878), for instance, a tax collector had seized the plaintiff's property on the asserted ground that it was part of a tax fraud scheme. The plaintiff argued that the seizure was actually motivated by malice against the plaintiff. This Court responded:

> This is an error. The question of malice or of good faith is not an element in this case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another . . . is quite immaterial.

Id. at 645. Phrased otherwise, the Court explained, all that matters is whether there were "circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged." *Id.* (internal quotation marks omitted).

This rule precluding inquiry into whether the basis for an arrest was pretextual is the rule applied in *Whren v. United States*, 517 U.S. 806 (1996), the case on which petitioners and their *amici* so heavily rely. In *Whren*, the officer pulled

a car over on the asserted ground that the driver committed traffic violations. It was not disputed that the officer had probable cause for that action. *Id.* at 810. The defendants, however, sought to show that the traffic violation was a mere pretext for the officer's "real" motive, i.e., to conduct a search for drugs, or simply because the occupants were black, motives that would not give probable cause for the stop. This would be consistent, they argued, with the Court's "past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas." *Id.* at 811. The Court rejected this approach, holding instead that the prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at 813. Further, the Court held that the defendants could not seek to inquire into the officer's subjective motives through the ostensibly "objective" device of showing that a "reasonable officer" would not have made the stop. *Id.* at 813-14. That approach, the Court explained, still reflects an impermissible effort to prove that the stop was pretextual:

> Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Id. at 814.

The difference between this case and cases such as *Stacey* and *Whren*, and all the cases discussed in *Whren*, is self-evident. In each of those cases, the officers at least had an objectively lawful and supportable "pretext" for the search or seizure when it was conducted. Not so here. Indeed, to the contrary, the cited "pretext" for the arrest – the Privacy Act charge – in this case was concededly *unlawful* and *not* supported by the facts that formed the basis for the arrest. If the asserted basis for the arrest is what the Fourth Amendment cares about, as the *Stacey-Whren* principle suggests, then the arrest in this case plainly violated the Fourth Amendment.

This case, in other words, has nothing whatsoever to do with whether or not the grounds for the arrest were a "pretext" for an ulterior motive. We may concede that the officer had no ulterior, unlawful motive in arresting respondent for violating the Privacy Act. But petitioners must concede that it was unlawful to arrest respondent on that basis. The question here is whether the arrest can be justified post hoc on some other basis that would have been lawful, if respondent had been arrested on that ground.

2. This Court's precedents indicate that the answer to that question must be no. As the Court in *Stacey* described the reasonableness inquiry, the question is whether the facts would support a reasonable officer in concluding "that the party is guilty *of the offense with which he is charged.*" *Stacey*, 97 U.S. at 645 (emphasis added). In several respects, the precedents establish that the question whether an officer had probable cause to arrest a person for a particular offense should be determined with respect to the facts that justified the arrest for *that* offense (or one closely related), rather than by scouring the record post hoc for *other* facts that could have justified an arrest for *other*, unrelated offenses.

To start, this Court's precedents demand that the individual police officer who made the arrest (or stop or search) be able to "justify[] the particular intrusion" by "point[ing] to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18; *see United States v. Cortez*, 449 U.S. 411, 418 (1979). This requirement obviously is not imposed as an academic exercise – a sort of after-the-fact game of find-the-facts-to-justify-the-intrusion-on-liberty. The requirement is, rather, a demand placed on each officer in the field: do not stop or arrest citizens unless there are specific and articulable facts that give you a basis for doing so. *Cf. United States v. Di Re*, 332 U.S. 581, 595 (1948) ("It is the officer's responsibility to know what he is arresting for, and why . . . .").

Consistent with that principle, the cases instruct courts to inquire not into the sufficiency of the facts that *might* have justified the officer's intrusion, but into the facts that *did* justify the officer's intrusion. Thus in *Terry*, the Court described "reasonableness" in the probable cause inquiry as "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to *the circumstances which justified the interference in the first place*." *Terry*, 392 U.S. at 20 (emphasis added); *see Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451, 2459-60 (2004). Similarly, in *Wong Sun v. United States*, 371 U.S. 471, 480 (1963), the Court described the "threshold" question as "whether the officers could, *on the information which impelled them to act*, have procured a warrant for the arrest of [a suspect]." *Id.* at 480 (emphasis added). In *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), the Court emphasized the Fourth Amendment's requirement in all seizure cases "that the facts *upon which an intrusion is based* be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Id.* at 654 (emphasis added). And in *Beck v. Ohio*, 379 U.S. 89 (1964), the Court warned that unless the trial court is "informed of the facts *upon which the arresting officers acted*," the court "cannot

properly discharge [its] function" of reviewing the constitutional validity of the arrest." *Id.* at 96 (emphasis added).

There was no suggestion in any of these cases that the officers could point to *other* circumstances or information which did not impel them to act, but which could have justified action. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court was even clearer, explicitly rejecting the Government's effort to justify an otherwise unlawful stop on the basis of record facts that could have justified the stop:

> The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop other than the apparent Mexican ancestry of the car's occupants.

Id. at 886 n.11.

This fundamental requirement that the individual officer be able to point to the specific and articulable facts that justified his action at the time (whatever his ulterior motives) loses force if the inquiry becomes whether any of the surrounding facts could have justified the same action in theory. Indeed, even the logic of the requirement becomes dubious: it can be important that the officer be able to identify specific and particularized facts only if they are specific and particularized *as to something*. Clearly, the assumption underlying the precedents is that the facts be particularized *to the offense for which the person was arrested*. And requiring that the officer who made the arrest be able to identify those facts shows that it matters what facts impelled that officer, at that time, to act.

Under the standard urged by petitioners, however, the facts that impelled the action are irrelevant. All that matters is whether there are any facts that *could* have impelled an intrusion. Under this standard, police officers on the scene

have much less incentive to consider whether the facts specifically justify an intrusion on a citizen's liberty. Secure in the knowledge that a prosecutor will scour the record post hoc to identify facts and offenses that would justify an intrusion (with the officer's recollections of the circumstances influenced by the new offenses identified as possible grounds for the arrest),[2] officers will be more likely to act on the basis of generalized suspicion of wrongdoing than on a particularized suspicion of criminal activity. *Cf. Indianapolis v. Edmond*, 531 U.S. 32 (2001) ("We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."); *Terry*, 392 U.S. at 21 (this Court has "consistently refused to sanction" "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches").

This is not say that the Court has condoned inquiry into the individual officer's actual *motives* for making an arrest on a given basis. It is to say, however, that the Fourth Amendment principles recognized by this Court *do* care about the facts and circumstances invoked to justify an arrest. As petitioners concede, an arrest may be justified only upon the basis of facts actually within the knowledge of the arresting officer. Petrs. Br. 16. What is more, this Court's cases have made clear that the court may consider the individual officer's own personal, subjective experiences in determining whether the officer had probable cause. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 700 (1996). All must agree, in other words, that the perspective of the arresting officer is not utterly irrelevant for Fourth Amendment purposes. The Fourth Amendment question is whether that officer, based on what that officer personally experienced

[2] *See Beck*, 379 U.S. at 96 ("an after-the-event justification for the arrest or search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

and knew, had a basis for the action *that officer actually took*. Although that question is evaluated from the objective perspective of a reasonable officer, the question is not whether a reasonable officer could have taken a different action. It is whether a reasonable officer could have taken the same action. Thus, if the individual officer arrested a person on the basis of specific, particularized facts showing that he was taping a conversation with the police officer, the Fourth Amendment question is whether a reasonable officer would have arrested a person on that basis. If the answer is no, it is irrelevant whether a reasonable officer could have pointed to other facts justifying an arrest on an entirely different basis.

3. We have already shown why *Whren* and other cases precluding inquiry into "pretext" do not compel a contrary result. In the end, petitioners' position rests on statements in three opinions: *Florida v. Royer*, 460 U.S. 491 (1983), *Scott v. United States*, 436 U.S. 128 (1978), and *United States v. Robinson*, 414 U.S. 218 (1973). None of these cases provides them adequate support.

a. Petitioners point to a single statement in the plurality opinion in *Royer*: "[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause[.]" 460 U.S. at 507. For three reasons, this statement does not authorize after-the-fact rationalizations of otherwise unlawful arrests.

First, the statement is unambiguously dictum. In *Royer*, a plurality of the Court held that the respondent was illegally detained when he consented to have his luggage searched, and therefore the resulting search was illegal. 460 U.S. at 507-08. The plurality's comment that the state could prove probable cause despite the arresting officer's belief that probable cause was lacking had nothing to do with the holding, outcome, or analysis in *Royer*. This Court has repeatedly warned that such statements are of no controlling force:

"It is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994); *see Montana v. Egelhoff*, 518 U.S. 37, 56 (1996); *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Second, although statements in dictum can be persuasive authority to the extent they are soundly reasoned, the *Royer* dictum is conclusory and supported by a dubious citation. *Royer* cites *Peters v. New York*, decided with *Sibron v. New York*, 392 U.S. 40, 66-67 (1968), in which the Court held admissible the fruits of an off-duty policeman's search of a burglary suspect. In *Peters*, a police officer personally observed conduct that reasonably caused him to be suspicious of the suspect's activities and to fear that he was in danger. *Id.* at 48. Accordingly, the officer's arrest and search of the suspect was found to be supported by probable cause. *Id.* at 66. Nothing in the record indicated that the police officer believed he lacked probable cause to stop and search the suspect. Accordingly, *Peters* does not support the proposition set forth in *Royer*.

Third, even on its own terms, it is not clear that the statement actually endorses the kind of sweeping post hoc justification for arrests urged by petitioners. The statement in *Royer* merely observes that the officers believed that they did not have probable cause to detain the traveler for suspicion of criminal activity. It is possible, however, that the officers did have a particularized basis in fact for suspecting that an offense had been committed, but merely mistakenly believed that those facts, as matter of law, did not add up to probable cause. But at least in that scenario, the question could be whether a reasonable officer would be justified in arresting on the basis of those same particularized facts. Here, by contrast, the question is whether the State could point to a set of entirely unrelated facts as establishing probable cause for an arrest that had nothing to do with those facts.

For all these reasons, *Royer* does not compel rejection of the "closely related offense" doctrine.

b. Petitioners also rely on the statement in *Scott* that "the fact that the officer does not have the state of mind . . . hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S. at 138. But in *Scott* – unlike this case – the officers *did* provide from the very outset an adequate "legal justification" for their action: telephone calls were being intercepted consistent with the purpose of the wiretap, with minimized interference with calls unrelated to that purpose. The defendant in *Scott* was complaining that the officers did not, in fact, adequately try to minimize interference, and thus could not justify the wiretaps by showing that there was no actual interference. It was in this context that the Court pointed out that the officers' state of mind was irrelevant: the wiretaps and amount of interference were consistent with the purpose of the wiretaps, and thus whatever else the officers were thinking (or not thinking) when they monitored the calls, the search was not objectively unreasonable.

If anything, the analysis in *Scott* supports the closely related offense doctrine. The key to the Court's opinion was that the interference was objectively consistent with the *stated purpose* of the wiretaps. Like other Fourth Amendment precedents, *Scott* holds that the search was justified because the objective facts and circumstances were consistent with the basis for the search. Here, by contrast, petitioners contend that the objective facts were consistent with *some other basis* for an arrest. *Scott* does not support that position.

c. Finally, petitioners cite *Robinson*, but again their reliance is misplaced. The Court in *Robinson* noted in passing

that a police officer's authority to conduct a search incident to a lawful arrest is unaffected by his lack of either "subjective fear" or a belief that the arrestee was armed. *Robinson*, 414 U.S. at 236. This observation merely confirms the principle, discussed above, that a police officer's subjective motive for a search does not render it illegal if the asserted basis for the search is objectively reasonable. Because the actual basis for the search in *Robinson* was as an incident to a lawful arrest, the officer's motive or state of fear were irrelevant. Here, by contrast, the asserted basis for the arrest was an objectively unreasonable alleged Privacy Act violation. *Robinson* does not validate that arrest in any way.

B. The Closely Related Offense Doctrine Is Consistent With The Fourth Amendment Standard Of "Objective Reasonableness"

Contrary to petitioners' submission, the "closely related offense" doctrine is perfectly consistent with this Court's precedents holding that an officer's motive for making an arrest is irrelevant, so long as the objective, asserted basis for the arrest is supported by the facts and law. Under this Court's cases, when an arrest is made, the articulated basis for that arrest is accepted at face value in order to avoid subjective inquiries. That articulated basis is an objectively ascertainable fact, not a subjective motive or experience. As a result, under the "objectively reasonable" test, the question is simply whether the objective circumstances support the asserted basis for the arrest.

The closely related offense doctrine advances this principle because it maintains focus on the totality of the objective, relevant circumstances. If an officer is (subjectively) mistaken about the precise offense for which the arrest was made, that does not invalidate the arrest if the facts and law, viewed objectively, support the officer's conclusion that the particular conduct at issue justified an arrest. The doctrine accomplishes this end by focusing on the conduct for which

the defendant was arrested – so long as some offense closely related to the offense specified renders the underlying conduct unlawful, the officer had an objective basis for arresting *for that conduct*, and the arrest is valid on that basis. In other words, the doctrine is indifferent to the subjective reasons behind the officer's articulation of the offense, whether the result of ignorance, good faith mistake, bad faith motive, or anything in between. As such, the doctrine represents an application, not a rejection, of the "objective reasonableness" standard.

C. The Closely Related Offense Doctrine Is Supported By Sound Policy

The closely related offense doctrine also advances sound law enforcement policies, contrary to petitioners' contention.

1. To start, it is important to understand the true background and function of the doctrine. The Solicitor General claims that "it is designed to prevent officers from 'justify[ing] what from the outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid.'" U.S. Br. 12 (emphasis added) (quoting *Vance v. Nunnery*, 137 F.3d 270, 275 (5th Cir. 1998)). That is incorrect. The doctrine does have the salutary *effect* of preventing post hoc justifications for arrests that were invalid on their own terms, but the *purpose* of the doctrine is not to invalidate objectively lawful arrests. Just the opposite is true: the closely related offense doctrine was devised, and has been most commonly employed, to *validate* arrests that could objectively be justified on the relevant facts, even though the police officer erred in specifying the precise grounds for the offense. In other words, in the face of a challenge to the validity of an arrest or a civil rights lawsuit seeking damages from an officer, the courts have afforded officers greater, not lesser, protection than that which was available in the absence of the doctrine.

The Fifth Circuit was the first court to develop and employ the "closely related offense" doctrine. Its early cases make clear that the court intended to give officers a certain amount of leeway for technical mistakes in articulating the basis for an arrest: "[W]e want it well understood that when a crime under which the arrest is made and a crime for which probable cause exists are in some fashion related, then there is no question but that there is a valid arrest." *Mills v. Wainwright*, 415 F.2d 787, 790 (5th Cir. 1969). As the court explained in *United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971), the rule assured the constitutionality of such arrests without forcing police officers to "routinely charge every citizen taken into custody with every offense they thought he could be held for in order to increase the chances that at least one charge would survive the test for probable cause." *Id.* at 838. The rule did preclude the "retroactive[] validat[ion]" of an arrest through "ex post facto extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest," *id.*, but this limitation – required as a practical matter by this Court's precedents, *see supra* at 7-10 – was the effect of the rule, not its motivating purpose.

As the rule has been further developed and applied in other circuits, it has become even clearer that its true function is to provide a margin of error for officers, not to establish "a game that the arrestee wins," Petrs. Br. 23. *See, e.g.*, *Vance*, 137 F.3d at 275 (doctrine "designed to protect police officers from civil liability for reasonable mistakes in judgment made when they effect warrantless arrests for conduct they believe is criminal"); *Avery v. King*, 110 F.3d 12, 14 (6th Cir. 1997) ("even where there is no probable cause to arrest the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense which may entitle the arresting officer to qualified immunity"); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993) ("in § 1983 actions for false arrest, probable cause

need not have existed for the charge for which the plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge"); *United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986) ("It is immaterial that at the time of the . . . arrest the officers did not have in mind the specific charge upon which the arrest can be justified; the offenses need only be closely related . . . ."); *Sheehy v. Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999) ("An officer's erroneous legal description of the basis for an arrest should not expose the officer to liability if another officer would have concluded that there was probable cause to arrest for a related offense on the basis of the same conduct.").

To be sure, the doctrine preserves the Fourth Amendment guarantee of freedom from unreasonable seizure in the narrow subset of cases in which the charged and uncharged offenses are wholly unrelated. But the reality is that the doctrine is used predominantly as a shield by law enforcement rather than as a sword by arrestees – salvaging arrests and insulating police officers from liability where the arrest otherwise would fail due to a lack of probable cause on the charged offense. *See Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982) (arrest valid because offenses were related); *Atkinson*, 450 F.2d at 838 (same); *Biddle*, 992 F.2d at 676 (same); *Avery*, 110 F.3d at 14 (same); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993) (same); *Rambo*, 789 F.2d at 1294 (same).

2. Although the central purpose of the closely related doctrine is "to protect police officers from civil liability," *Vance*, 137 F.3d at 275, courts have accomplished this goal by "strik[ing] a balance which allows the arresting officer to choose which crime she will charge without having to charge every single offense sustainable on the facts, and yet does not 'open[] the door to the "extrapolation" of offenses in an effort to justify a sham arrest.'" *Biddle*, 992 F.2d at 676-77 (quoting *Trejo*, 693 F.2d at 485). This "carefully constructed 'compromise'" has the effect of permitting "freedom of

charge choice," *Trejo*, 693 F.2d at 485-86, while encouraging police officers to make arrests only when they have a valid basis for doing so. *Cf. Vance*, 137 F.3d at 275 (quoting *Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989)) (doctrine discourages "sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid"). In achieving this equilibrium, "the federal courts have both grasped the realities of modern law enforcement and protected our Fourth Amendment freedoms." *Vance*, 137 F.3d at 275.

Petitioners, however, would have the courts go much further, tipping the balance entirely in favor of the police. Invoking a parade of horribles, they warn that if this Court endorses the closely related defense doctrine, police will overcharge or not charge at all, and prosecutors will be paralyzed in their discretionary charging decisions. *See* Petrs. Br. 24-25; *see also* U.S. Br. 19-20. Petitioners, however, do not cite *any* evidence that these alleged horrors have actually befallen the many jurisdictions that have been employing the doctrine for decades. The lack of evidence is hardly surprising, for petitioners' policy concerns do not even make logical sense.

a. First, there is no basis for the claim that the closely related offense doctrine harms arrestees by causing law enforcement to overcharge. As already explained, courts have properly struck the balance where they have precisely to avoid the necessity of charging every conceivable offense. By excusing technical errors regarding the precise offense most applicable to the conduct that caused the arrest, the doctrine ensures that officers need not worry over every last detail in the booking document to ensure preservation of the arrest. It is only post hoc reliance upon entirely unrelated charges that the doctrine precludes. Limiting post hoc justifications to the booked offense (or one closely related) would not "frustrate any legitimate interest of society" because if the officers had probable cause to arrest a citizen on a wholly unrelated offense, "all they had to do was to arrest and book

him" on that charge. *Wainwright v. New Orleans*, 392 U.S. 598, 606 (1968) (Warren, C.J., dissenting from dismissal of writ). And contrary to petitioners' absurd suggestion, Petrs. Br. 24 n.5; *see also* U.S. Br. 19-20, criminal defendants obviously would *not* prefer a system that allows the government to obscure the basis for an arrest and to surprise defendants later with new theories of criminal conduct and new justifications for the arrest. A defendant is plainly better off receiving notice of the bases for his arrest as early as possible (and planning his defense accordingly), rather than having after-the-fact justifications sprung upon him later.

b. Second, it is equally untrue that the closely related offense doctrine harms defendants by causing police to avoid charging at all. Even if the doctrine did lead inevitably to that result, it is hardly clear that defendants are better off with a system that allows police to arrest on a wholly unreasonable basis, only to salvage the arrest with an entirely unrelated after the fact justification. Indeed, an arrestee is more likely to be cautious in his dealings with police if they refuse to divulge any basis for the arrest. By contrast, one charged on unreasonable or sham grounds might reasonably believe unrelated conduct to be irrelevant and let his guard down.[3] In any event, there is no empirical basis for the claim that police will simply keep secret the bases for their arrests. Not only is there no evidence for this in jurisdictions that already recognize the closely related offense doctrine, but in many jurisdictions an arrestee has an affirmative right to be informed of the basis for his arrest.[4]

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[3] Authority extolling the benefits of providing an arrestee with charge information (U.S. Br. 20 n.9) no doubt presumes that *all* charges supported by probable cause are to be articulated, rather than only those that will inevitably be dismissed.

[4] *See, e.g.*, 725 Ill. Comp. Stat. Ann. 5/103-1(b); Ken. Rev. Stat. Ann. § 431.025(1); Minn. Stat. 611.01; Or. Rev. Stat. § 133.235(3); S.C. Code Ann. § 17-13-50; Utah Code Ann. § 77-7-6(1).

c. Petitioners' concerns about curtailing prosecutorial discretion are also baseless. Petrs. Br. 24-25. Petitioners insist that "no sound policy is served by precluding the prosecutor from amending the [unsupported] charge to one for which probable cause does exist," and that "a prosecutor should have authority to amend a charge as additional information is discovered." Petrs. Br. 25. But a prosecutor of course remains free at all times to amend a charging document to include all offenses for which the defendant will be prosecuted. The closely related offense doctrine applies only to the charges that may be cited as justifying the initial arrest. It has nothing to do with the prosecutor's authority to amend a charging document to prosecute a defendant on the basis of newly discovered theories or evidence.

II. THE QUALIFIED IMMUNITY QUESTION RAISED BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT

Even though their conduct violated respondent's Fourth Amendment right to be free from unreasonable seizure, petitioners contend that they are immune from liability under the principles of "qualified immunity" this Court's jurisprudence has developed to protect officers who, although acting reasonably, inadvertently violate suspects' constitutional rights. Amicus NACDL's principal interest in this case is the underlying probable cause issue, but because qualified immunity reduces police officers' incentives to respect defendants' rights, NACDL has views on that issue as well. *See infra* note 5. For the reasons briefly elaborated below, however, we submit that the qualified immunity question is not properly presented here and should not be addressed.

To start, it is important to clarify the qualified immunity issue as it comes to this Court. The applicable standard is settled: petitioners are immune from liability for their unlawful arrest of respondent if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). A critical component of this inquiry is whether the officers violated "clearly established law."

Petitioners and the United States treat the "clearly established law" issue as whether the closely related offense doctrine was clearly established at the time of respondent's arrest. This is incorrect. Petitioners did not assert qualified immunity in the trial court on the basis of judicial disagreement over the closely related offense doctrine. The jury was instructed only that "under clearly established law, the conduct for which Alford was arrested was not a violation of the Privacy Act." Pet. App. 10a, 11a. Petitioners do not appear to have requested – and certainly did not receive – any instruction as to whether the closely related offense doctrine was clearly established law. Nor did petitioners raise this defense on appeal. The Ninth Circuit raised the doctrine itself just before oral argument, Pet. App. 24a, but the court addressed the doctrine only in relation to the question of whether petitioners' conduct violated the Fourth Amendment, not the separate question of whether the doctrine was established with sufficient clarity to afford petitioners a qualified immunity defense. The majority and dissenting opinions debated whether respondent's arrest violated clearly established law *under the Privacy Act*, *see* Pet. App. 11a (maj. op.), 20a (dissent), but neither opinion considered whether the closely related offense doctrine was clearly established law when respondent was arrested. That question therefore is not properly before this Court.

The proper question – as all three judges on the panel below recognized – is whether it was clearly established at the time of the arrest that respondent's conduct did not violate the Privacy Act. But that question, too, is not adequately presented here. The jury was instructed that respondent's arrest was clearly unlawful under the Privacy Act, and petitioners did not challenge that instruction on appeal or in this Court.

In short, apart from the underlying question whether petitioners' conduct violated the Fourth Amendment at all, this case does not adequately present any qualified immunity issue. If petitioners cannot now justify the arrest on the basis of an offense related to the alleged Privacy Act violation – if the arrest was unlawful under the Fourth Amendment, in other words – they have effectively waived any claim to immunity on the ground that a reasonable officer might have *thought* the arrest could be justified post hoc on the basis of an uncharged, unrelated offense. Accordingly, if the Court affirms the decision below to the extent it followed the closely related offense doctrine in analyzing the legality of respondent's arrest, the Court should decline to address the additional qualified immunity questions petitioners raise.[5]

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[5] It is not clear the approach taken by petitioners and the United States makes analytical sense in any event. A right is clearly established for purposes of qualified immunity if officers may "reasonably anticipate when their conduct may give rise to liability for damages." *Anderson*, 483 U.S. at 639 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)); *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999) (whether "reasonable officer could [] have believed that his actions were lawful"). Petitioners' "conduct" in this case was the arrest of respondent for violation of the Privacy Act. That arrest, when it occurred, was unreasonable because it was clearly established that the Act did not criminalize respondent's conduct under the circumstances. It makes little sense to ask whether a reasonable officer who makes an arrest on a patently unreasonable basis would have done so because he (a) expected that the trial court would follow the closely related offense doctrine, and (b) assumed that the prosecutor would be able to come up with some adequate post hoc rationalization for the arrest. In other words, an officer who makes an arrest on a patently unreasonable basis may reasonably anticipate that the arrest will give rise to liability for damages, and thus there is no unfairness in denying the officer immunity. The officer who reasonably believes there is a valid basis for the arrest can easily assure himself of immunity simply by charging that offense, which is consistent with sound law enforcement and Fourth Amendment policies in any event. Accordingly, it is unsurprising that no court that has applied the closely related doctrine in the context of a § 1983 lawsuit has considered the question whether the doctrine – as opposed to the actual basis for the arrest – was clearly established law at the time of the arrest.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GERALD DEVENPECK, *et al.*,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a warrantless arrest is lawful under the Fourth Amendment when the facts known to the arresting officer amount to probable cause to believe the suspect committed a crime, even if that crime is different from—and is not closely related to—the offense identified by the officer at the time of the arrest.

2. Whether the law governing that question was clearly established at the time of the arrest at issue in this case, when federal and state appellate courts had reached conflicting conclusions with respect to the applicable legal standard.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici*'s members are responsible for law enforcement at the state and local level—through state, city, county, and town police departments; they therefore have a compelling interest in legal issues relating to law enforcement.

This case presents two questions of great importance to effective law enforcement. The first issue involves the Fourth Amendment standard applicable to warrantless arrests; in particular, whether an arrest may be upheld if the facts known to the arresting officer constitute probable cause with respect to an offense that is not related to the one articulated to the suspect at the time of arrest. In the course of an investigation, law enforcement officers may learn a variety of facts about a potential suspect; these facts may relate to different types of unlawful activity. Restricting the probable cause inquiry on the basis of the offense the officer articulates at the time of arrest imposes an unjustified technical limitation that will hinder law enforcement efforts significantly by invalidating arrests in circumstances in which there is probable cause to believe that the suspect committed a crime.

In addition, that rule would have the practical effect of forcing officers to take precious time to try to identify all of the potential crimes that might be charged against a particular suspect—and then list those crimes at the time of arrest—in an attempt to prevent subsequent invalidation of the arrest. That mechanical exercise would burden law

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person other than *amici* or their members made a monetary contribution toward its preparation or submission.

enforcement without protecting any interest related to the Fourth Amendment.

The second issue in this case involves the application of the qualified immunity standard in damages actions under 42 U.S.C. § 1983. That standard was misapplied by the Ninth Circuit to impose damages liability in circumstances in which appellate courts disagreed with respect to the governing constitutional rule—notwithstanding this Court's admonition that law enforcement officers should be subjected to damages liability only when the unconstitutionality of their actions should have been apparent. Clarifying the application of the immunity standard is important to individual law enforcement officers as well as to *amici*, for whom defense of these actions constitutes a substantial burden.

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent seeks damages under 42 U.S.C. § 1983, asserting that petitioners violated his Fourth Amendment rights when they arrested him in November 1997. Petitioners prevailed at trial but the court of appeals reversed, holding that the arrest was invalid under the Fourth Amendment and that petitioners are not entitled to immunity from liability for damages.

The court of appeals first concluded that the arrest could be upheld only if petitioners possessed probable cause with respect to the offense they cited at the time of the arrest—violation of the Washington Privacy Act—or a closely related offense. Because the court found that petitioners lacked probable cause for the Privacy Act offense, and that the crimes for which petitioners asserted that they had probable cause were not closely related to that offense, it held that the arrest

violated the Fourth Amendment. The court also determined that petitioners are subject to damages liability because in its view a prior Ninth Circuit decision established clearly that petitioners could not justify an arrest under the Fourth Amendment by demonstrating probable cause with respect to an offense not closely related to the offense identified by the officers at the time of arrest. Each of these holdings is plainly wrong.

I. The fundamental purpose of the Fourth Amendment's probable cause standard is to prevent arbitrary and unreasonable conduct by law enforcement officers. Requiring facts amounting to probable cause in order to carry out an arrest ensures that there is an objective basis for singling out an individual and subjecting him or her to the burdens attendant to arrest.

Narrowing the probable cause inquiry to focus only on offenses related to the one cited at the time of arrest does nothing to further this purpose. Instead, it fundamentally alters the long-established balance between the interests of the individual and those of the government—by invalidating arrests notwithstanding the presence of probable cause to believe that the suspect committed a crime—without furthering any interest relevant to the Fourth Amendment.

Indeed, this Court's decisions emphasize that the probable cause inquiry turns entirely on an objective standard, and that the arresting officer's subjective intention is therefore irrelevant in determining the presence of probable cause. An arresting officer's reference to a particular offense is simply a reflection of that officer's subjective view of the justification for the arrest and therefore cannot displace the objective analysis under the Fourth Amendment.

Finally, the practical consequences of the court of appeals' "closely related offense" rule weigh heavily against its adoption. Arrests frequently occur in circumstances in which the

arresting officer knows of facts indicating that the suspect engaged in several separate episodes of unlawful conduct. The officer's on-the-spot determination regarding which offense to articulate as a basis for an arrest inevitably will be a hurried determination made while simultaneously attempting to restrain the suspect, preserve relevant evidence, and prevent passers-by from interfering with essential police work. Moreover, an arresting officer is not likely to be sufficiently familiar with the elements of various offenses to perform quickly the comparisons necessary to determine whether particular offenses are likely to be deemed sufficiently related by a reviewing court. The inevitable result is that arrests will be set aside—and suspects will go free—because an officer articulated the wrong offense at the time of arrest. Nothing in the Fourth Amendment requires this absurd result.

II. The court of appeals' immunity analysis is similarly flawed. A law enforcement officer is immune from damages liability unless the unlawfulness of his conduct was apparent. At the time of the arrest in this case, there was a conflict among appellate courts with respect to the applicable Fourth Amendment standard: some courts had adopted the closely related offense standard espoused by the Ninth Circuit, but others—including the Washington state appellate courts—held that an arrest could be justified if the facts known to the officer amounted to probable cause with respect to any offense, including those unrelated to the offense articulated by the arresting officer.

This Court has recognized that "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Accordingly, a reasonable officer in petitioners' position would not have known that it was unlawful to justify the arrest on the basis of probable cause with respect to other

offenses. Because petitioners could reasonably have believed that the facts known to them amounted to probable cause with respect to offenses other than the one cited at the time of arrest, they are entitled to immunity from damages liability.

ARGUMENT

I. THE ARREST OF RESPONDENT DID NOT VIOLATE THE FOURTH AMENDMENT.

There is perhaps no blacker black letter law than the principle that the Fourth Amendment permits a law enforcement officer to make an arrest if the facts known to the arresting officer constitute probable cause to believe that the suspect committed a criminal offense. See, *e.g.*, *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979).

Notwithstanding that settled rule, some lower courts—including the Ninth Circuit in this case—have held that if an officer tells a suspect he is under arrest for a particular crime, the arrest cannot be upheld on the basis that the facts known to the officer constituted probable cause to believe the suspect committed a different crime. According to these courts, the arrest is valid only if the facts amount to probable cause with respect to the crime cited by the arresting officer or a "closely related" offense.

Nothing in the Fourth Amendment justifies hobbling law enforcement officers in this manner. The Ninth Circuit's rule finds no support in the principles underlying the Fourth Amendment's probable cause requirement and violates this Court's repeated injunction that the probable cause inquiry does not turn upon the subjective beliefs of the arresting officer. Moreover, a closely related offense rule would be highly burdensome on law enforcement because it would be difficult for law enforcement officers to predict whether a court subsequently would deem offenses to be related sufficiently. To avoid invalidation of their arrests, officers

would be forced to recite a litany of all possibly applicable offenses—a burden that would serve no substantive purpose related in any way to the interests protected by the Fourth Amendment.

A. This Court's Fourth Amendment Jurisprudence Precludes Restricting The Probable Cause Inquiry To The Offense Cited By The Arresting Officer Or To "Closely Related" Offenses.

1. The Court has explained that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions."'" *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (citations omitted). Accord *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Delaware* v. *Prouse*, 440 U.S. at 654.

Probable cause is required to justify an arrest under the Fourth Amendment because that standard "embodie[s] 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interference with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway* v. *New York*, 442 U.S. at 208 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)). "The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." 442 U.S. at 208; see also *Maryland* v. *Pringle*, 124 S. Ct. 795, 799 (2003); *Whren* v. *United States*, 517 U.S. 806, 818 (1996) (referring to "the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact").

The fundamental purpose of the probable cause requirement, therefore, is to impose an objective limitation on the conduct of law enforcement officers in order to prevent arbitrary and unreasonable arrests. As long as there is probable cause to believe that the suspect committed a crime—any crime—this purpose will be fulfilled; by definition the arrest will not be arbitrary because there *is* an objective basis for singling out that particular individual.

Similarly, the existence of probable cause justifies subjecting the suspect to the burdens attendant to an arrest. The particularized, objective facts demonstrating that the suspect may have committed a crime establish that the government's interest in safeguarding the community outweighs the individual's privacy and security interests.

Narrowing the inquiry to consider only whether there was probable cause to arrest the suspect for the offense articulated by the officer—or some set of closely related offenses—accordingly is not necessary to serve the purposes underlying the probable cause requirement. Rather, such an approach would fundamentally alter the long-established balance between the interests of the individual and those of the community. It would mean that even when there is probable cause to believe an individual has committed a crime, an arrest would be unlawful if the officer articulated the wrong reason for the arrest. That is inconsistent with this Court's decisions holding that the presence of probable cause by itself is sufficient to protect against arbitrary government action and to justify an intrusion on the suspect's privacy and security interests. The "closely related" standard is an unjustified restriction on law enforcement that will result in the

invalidation of numerous arrests without protecting any interest relevant to the Fourth Amendment.

Indeed, as we next discuss, restricting the Fourth Amendment analysis to the offense identified by the arresting officer is fundamentally at odds with this Court's repeated admonition that an officer's subjective intentions are irrelevant under the Fourth Amendment.

2. In *Maryland* v. *Pringle*, *supra*, the Court explained that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." 124 S.Ct. at 800 (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). The probable cause standard thus embodies an entirely objective test—it takes the facts known to the arresting officer and determines whether a reasonable police officer would conclude that those facts amount to probable cause.

The arresting officer's subjective views are irrelevant to this inquiry. It does not matter that the arresting officer may not believe that the facts sufficed to establish probable cause; and it does not matter that the arresting officer's stated reason for an arrest may be a pretext. *Whren*, 517 U.S. at 812-813 (discussing cases); see also *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001); *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000); *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996). This Court has broadly stated that its decisions "foreclose any argument that the constitutional reasonableness of [arrests] depends on the actual motivations of the individual officers involved. * * * Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

Assume that an arresting officer did not identify any particular offense at the time of arrest, but merely had an

unexpressed subjective intent to arrest a suspect for a particular offense. *Whren* and *Sullivan* leave no doubt that such a subjective intent would have no bearing on the probable cause inquiry; the question would be whether the officer had probable cause to arrest the suspect for some offense. An unexpressed motivation is plainly irrelevant.

The fact that the officer expressly references an offense at the time of arrest does not change this analysis, for three basic reasons. *First*, whether or not it is articulated to the suspect, the officer's reason for the arrest still represents only that officer's subjective motivation. As in *Whren* and *Sullivan*, the officer's subjective view should not affect the Fourth Amendment analysis.

The court below seemed to indicate that the "closely related" test was necessary because it precluded "sham arrests or later extrapolated justifications." Pet App. 12a-13a n.2. However, this Court made clear in *Whren* that the existence of a pretext is irrelevant under the Fourth Amendment: "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances *whatever* the subjective intent." 517 U.S. at 814 (emphasis in original). Accordingly, prevention of pretextual arrests cannot be used to justify limiting the scope of the probable cause inquiry. Accord *United States* v. *Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) (relying on *Whren* in holding that probable cause inquiry may encompass offenses other than those articulated at the time of arrest).

Second, while law enforcement officers ordinarily articulate grounds for an arrest at the time of the arrest, nothing in the Fourth Amendment requires an officer to do so. As we have discussed, the focus of the Fourth Amendment is to prevent arbitrary government action that unreasonably intrudes on the privacy and other interests protected by the Amendment. Requiring the arresting officer to inform a suspect of the reason for the arrest is irrelevant to this pur-

pose, and there is no other Fourth Amendment value that requires arresting officers to articulate the reasons for an arrest.

Not surprisingly, this Court has never indicated that the Fourth Amendment requires an arresting officer to provide a suspect with that information. Several lower courts have rejected such a requirement. See *Williams* v. *Schario*, 93 F.3d 527 (8th Cir. 1996); *Kladis* v. *Brezek*, 823 F.2d 1014 (7th Cir. 1987).

Of course, the Sixth Amendment does provide that "*[i]n all criminal prosecutions*, the accused shall * * * be informed of the nature and cause of the accusation" (emphasis added). And if the government seeks to detain a suspect, it is required to obtain a prompt post-arrest judicial determination of the existence of probable cause (see *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991)), which necessarily will require the government to identify the offense for which it claims the facts amount to probable cause. Respondent did not assert a violation of either of these rights.

Third, there can be no argument that the suspect has any legitimate reliance interest that would be harmed by justifying his arrest by reference to offenses other than the one cited by the arresting officer. The suspect has no basis for relying on the offense cited by the arresting officer because the government remains free to bring additional or entirely different charges. Indeed, even the court below would allow probable cause to be justified on the basis of "closely related" offenses, a standard that concedes the absence of any reliance interest in this context.

In sum, the principles underlying the probable cause requirement make clear that an arrest may be justified on the basis of probable cause with respect to any offense, whether or not it was identified by the arresting officer at the time of the arrest.

B. Important Practical Considerations Weigh Heavily Against The Court Of Appeals' "Closely Related" Standard.

The Court has emphasized the importance of adopting clear Fourth Amendment standards that are readily administrable by the officers in the field who are charged with deciding whether and how to make an arrest:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see also *New York* v. *Belton*, 453 U.S. 454, 458 (1981); Wayne R. LaFave, *Search and Seizure* § 1.4(d), at 114 (3d ed. 1996) (rejecting standard for arrest that requires officers to "act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers") (citation and internal quotations omitted).

Police investigations—even investigations that culminate in warrantless arrests—frequently turn up facts concerning a suspect that do not fit neatly into one episode or category of criminal activity. Often, an officer learns facts about a suspect that may point toward several different criminal acts that occurred at several different times and places. In addition, it may be possible to charge a number of different offenses for each of those acts.

Application of the conventional probable cause standard in this context is straightforward and well-established. The facts known to the arresting officer are examined to deter-

mine whether they amount to probable cause to believe that the suspect committed a criminal offense.

The "closely related" test, by contrast, is likely to sow considerable confusion. The arresting officer must make an important on-the-spot decision: which offense to articulate at the time of arrest. That decision carries significant consequences, because it will limit the government's ability to defend the lawfulness of the arrest under the Fourth Amendment. The officer would have to weigh the relative strength of the evidence supporting probable cause with respect to different criminal acts and try to predict which offenses a court would later determine to be closely related. The officer's goal, of course, would be to articulate the most all-encompassing offense in order to ensure that as many other offenses as possible will be deemed "closely related" and the probable cause inquiry therefore would have the fewest possible restrictions.

This is a heavy burden to impose on the officer on the scene, who simultaneously is attempting to restrain the suspect, preserve relevant evidence, and prevent passers-by from interfering with essential police work. There simply is no way that police officers will be able to undertake a calm assessment of these difficult issues and come to a reasoned conclusion in every case.

In *City of Lago Vista* the Court rejected a legal rule that turned on the distinction between offenses for which a convicted defendant might be jailed and those for which a fine would be the only permissible sanction. The Court reasoned that "[t]he trouble with this distinction, of course, is that an officer on the street might not be able to tell" the difference. 532 U.S. at 348. Here too, an officer on the street is not likely to be able to assess the relative strength of probable cause or determine whether an offense will be judged closely related or not—a distinction that could turn on a comparison of the elements of the two offenses, whether the

two charges would be based on similar facts, and other factors that a court reviewing the issue in hindsight might deem relevant.

The inevitable consequence of limiting the probable cause inquiry in this manner will be that officers' necessarily hurried decisions will lead to the subsequent invalidation of arrests on the ground that the officer lacked probable cause with respect to the identified offense—even if there was probable cause with respect to other, unrelated offenses. And, because searches incident to arrest frequently produce incriminating evidence, invalidation of the arrest would lead inexorably to exclusion of this evidence and the likelihood that the government will be unable to bring to justice individuals who have engaged in criminal activity.

This practical effect would likely lead police officers to refuse to identify an offense at the time of arrest, or "create an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive'—yielding no additional protection of civil liberties while adding considerably to the burden placed upon both defendants and police." *United States* v. *Bookhardt*, 277 F.3d at 566 (citation omitted).

Nothing in the Fourth Amendment mandates these absurd results. As in *City of Lago Vista*, the Court should reject this limitation on the probable cause inquiry because of its adverse practical effects.

C. The Facts Known To Petitioners Amounted To Probable Cause To Arrest Respondent For Impersonating A Law Enforcement Officer and for Obstructing a Law Enforcement Officer.

There was no Fourth Amendment violation in this case because the facts known to petitioners amounted to probable

cause to arrest respondent for offenses other than the Privacy Act violation cited by petitioners at the time of the arrest.

Petitioners argued at trial that the facts known at the time of arrest constituted probable cause to arrest respondent for impersonating a law enforcement officer and obstructing a law enforcement officer, and the jury was instructed with respect to the probable cause standard. J.A. 201. Because the jury rendered a general verdict in petitioners' favor, petitioners are entitled to "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). There was ample evidence to support the conclusion that the facts known to petitioners amounted to probable cause with respect to these two offenses.

Under Washington law, criminal impersonation in the second degree requires proof that the defendant "creates an impression that he or she is a law enforcement officer" with the intent to convey that impression, such that "a reasonable person would believe that the person is a law enforcement officer." Wash. Rev. Code Ann. § 9A.60.040. Here petitioners were aware of the following facts: the motorists whom respondent had assisted told petitioner Haner that they believed respondent "was a cop" because of the flashing headlights on his car that resembled the "wig-wag" lights on a police car (J.A. 96); petitioner Haner observed that respondent was "listening in to the Kitsap County Sheriff's Office frequency on his ham radio" (J.A. 103) and that respondent also had a portable hand-held police scanner in his car (*ibid.*); respondent told petitioner Haner that he was in possession of handcuffs (J.A. 105); respondent claimed he was a former highway patrol officer (J.A. 106); and respondent was "evasive" about operating his car's flashing headlights. J.A. 107; see also J.A. 179-180 (testimony of Deputy Prosecuting Attorney Mark Lindquist, who was consulted by petitioners at

the time of the arrest, that "there was clearly probable cause" based on the foregoing facts).

Furthermore, Washington law provides that a person is guilty of obstructing a law enforcement officer if the person "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." Wash. Rev. Code Ann. § 9A.76.020. In his conversations with petitioners prior to arrest, respondent gave conflicting answers to questions regarding his wig-wag headlights. He first claimed that he had permission to have these headlights (which are prohibited under state law) (see J.A. 109 & 134-135), but then asserted that they were part of his car alarm system (J.A. 137-138). Respondent also appeared to petitioners to be evasive regarding the officers' requests to operate the system—ignoring the operating switch that petitioner Haner observed on the car's steering column (J.A. 107-109 & 138).

Probable cause does not require certainty or proof beyond a reasonable doubt. It exists when the facts known to the officers are "'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. at 175-176 (citation omitted). The jury properly concluded that these facts were sufficient to establish probable cause with respect to these two offenses.

II. PETITIONERS ARE IMMUNE FROM DAMAGES LIABILITY BECAUSE THEY DID NOT VIOLATE CLEARLY ESTABLISHED LAW.

Even if, contrary to our submission, the arrest of respondent violated the Fourth Amendment, petitioners are immune from liability for damages under 42 U.S.C. § 1983.

Law enforcement officers are protected by a qualified immunity in actions under Section 1983, "shielding them from civil damages liability as long as their actions could

reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); see also *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (officers "are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

This Court has explained that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citation omitted); accord *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (whether the state of the law at the time of the challenged conduct "gave [defendants] fair warning" that their conduct was unconstitutional); *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); *Hunter* v. *Bryant*, 502 U.S. 224, 227-228 (1991).

The court of appeals concluded (Pet. App. 12a-15a) that a reasonable officer in petitioners' position should have known that respondent's conduct did not constitute a violation of the Washington Privacy Act—and therefore petitioners could not reasonably have believed that they had probable cause to arrest respondent on that ground. Judge Gould disagreed with that determination (*id.* at 17a-22a).

This Court need not—and should not—resolve that narrow issue, however, because the court of appeals' immunity analysis suffers from a more fundamental flaw. Even if petitioners could not reasonably have believed that they had

probable cause to arrest respondent for violating the Privacy Act, they nonetheless are immune from damages liability.

To begin with, it was far from apparent when petitioners arrested respondent in November 1997 that petitioners could justify an arrest of respondent only by reference to the offense they cited at the time of arrest. Petitioners could reasonably have believed that the Fourth Amendment permitted them to justify the arrest by the existence of probable cause to believe that respondent had committed any offense, not just the offense they cited at the time of arrest or offenses closely related to it. Although the Ninth Circuit may have adopted the "closely related" test prior to the events at issue here (see Pet. App. 10a & 12a-13a n.2)[2], the Washington state courts—the courts of the State that employed petitioners and in which the events here took place—had held that an arrest could be justified by reference to any offense for which the arresting officers possessed probable cause. *Washington* v. *Vangen*, 433 P.2d 691 (Wash. 1967); *Washington* v. *Huff*, 826 P.2d 698 (Wash. Ct. App. 1992); *City of Seattle* v. *Cadigan*, 776 P.2d 727 (Wash. Ct. App. 1989); *Washington* v. *Stebbins*, 735 P.2d 1353 (Wash. Ct. App. 1987).

Other appellate courts had adopted the same view as the Washington state courts. See, *e.g.*, *People* v. *Rodriguez*, 53 Cal. App. 4th 1250, 1265-1267 (1997); *United States* v. *Joyner*, 492 F.2d 655, 656 (D.C. Cir. 1974); *United States* v. *Saunders*, 476 F.2d 5, 7-8 (5th Cir. 1973). And numerous courts adhere to that position today. See, *e.g.*, *United States* v. *Bookhardt*, 277 F.3d at 564-65 & n.10; see generally Wayne R. LaFave, *supra*, § 5.1(e), n.190 (collecting cases).

This Court has observed that "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to

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[2] Petitioners observe (Pet. 23) that it is not even clear that the Ninth Circuit had in fact adopted the closely related test prior to the arrest in this case.

money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618. In *Wilson*, moreover, the Court held that a legal principle was not clearly established even though the conflict among appellate courts developed *after* the events in question. Here the conflict existed at the time of the officers' actions. Surely no reasonable officer could predict whether the Ninth Circuit, rather than his own State's appellate courts, had adopted the correct constitutional rule.

The restrictions imposed by the "closely related" test therefore could not have been apparent to petitioners. Rather—in view of the conflicting authority among appellate courts—an officer in petitioners' position could reasonably have believed that an arrest would be lawful under the Fourth Amendment on the basis of facts constituting probable cause to believe that the suspect had committed *any* offense. Accordingly, as long as the facts known to petitioners would allow an officer in their position reasonably to believe that he had probable cause to arrest respondent for any offense, petitioners are entitled to immunity.

The Ninth Circuit advanced two reasons for its contrary conclusion. First, it appeared to assert (Pet. App. 12a-13a n.2) that its prior decision adopting the closely related test rendered this legal issue clearly established within the Ninth Circuit. But that conclusion ignores this Court's determination in *Wilson* that a conflict among appellate courts establishes conclusively that a legal issue is *not* clearly established. Certainly that rationale applies here where petitioners' own state courts had adopted the conflicting constitutional interpretation.

Moreover, the Ninth Circuit's approach would force law enforcement officers to conform their conduct to a potentially erroneous legal standard—on penalty of personal monetary damages—even if the standard had been rejected by every other appellate court to consider the question. That result

would unjustifiably hobble law enforcement efforts. It also could prevent law enforcement authorities in jurisdictions whose courts had adopted an erroneous interpretation of the Constitution from developing a challenge to that interpretation with the goal of obtaining review of the issue by this Court. Government officers might be reluctant to act because they could be required to pay money damages if that challenge were not successful—again, even if numerous other appellate courts had adopted the interpretation that the officials were seeking to vindicate.

The Ninth Circuit's second rationale for refusing to uphold petitioners' immunity on the basis of the existence of probable cause for other, unrelated offenses was that to do so "would improperly turn the objective reasonableness inquiry into an inquiry into the officers' subjective motivations or beliefs at the time of arrest" (Pet. App. 12a-13a n.2). As we have discussed, however (see pages 7-9, *supra*), it is the Ninth Circuit's closely related rule that has this impermissible effect by restricting the probable cause inquiry to those offenses closely related to the one mentioned by the arresting officer.

In any event, even if this observation were correct it would not provide any support for refusing to recognize that an arrest can be justified by probable cause with respect to a crime other than the one cited at the time of arrest. As in *Wilson*, "[i]f * * * judges disagree" on a constitutional issue (526 U.S. at 618), officers on the beat cannot be expected to parse the legal reasoning of the various appellate courts in order to divine the correct constitutional answer. See also *Anderson*, 483 U.S. at 646 (purpose of qualified immunity "would be utterly defeated" if officials were required to "entangl[e] themselves in the vagaries of the English and American common law").

For all of these reasons, a reasonable officer in petitioners' position would not have known that it was unlawful to justify

respondent's arrest on the basis of probable cause with respect to other offenses. Petitioners' claim of immunity therefore may not be circumscribed by the Ninth Circuit's closely related test.[3]

This does not mean that petitioners are required to establish the existence of probable cause to arrest respondent for another offense. The Court held in *Hunter* v. *Bryant*, *supra*, that the law enforcement agents in that case were entitled to immunity because even if they "erred in concluding that probable cause existed to arrest [the plaintiff], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." 502 U.S. at 228-229. Petitioners therefore are entitled to immunity unless it should have been apparent that they lacked probable cause to arrest respondent for any offense.

As we have discussed (see pages 13-15, *supra*), there is more than ample evidence to uphold the jury's verdict on the ground that the facts known to petitioners amounted to probable cause with respect to two offenses—impersonating an officer and obstructing an officer. That same evidence supports the conclusion that it could not have been apparent to petitioners that they lacked probable cause to arrest respondent for these offenses. The court of appeals therefore erred in setting aside the jury's verdict for petitioners.

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[3] Even if the "closely related" standard were clearly established, it would be necessary to determine whether it should have been apparent to petitioners that other offenses for which there was probable cause (or for which an officer could reasonably believe there was probable cause) were not closely related to a state Privacy Act violation and therefore could not have been invoked to justify the arrest. The court of appeals did not explain how a reasonable officer in petitioners' position would have known the standard for determining whether offenses are closely related and would have known that the other offenses invoked in this case did not satisfy that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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